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No. _____

IN THE

Supreme Court of the United States

October Term, 1984

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

THE SANSOM COMMITTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether, consistent with the opinions of this Court in *United Mine Workers v. Gibbs* and *Aldinger v. Howard*, a District Court may, by entry of a consent decree, obtain ongoing jurisdiction over a party as to whom no independent basis for subject matter jurisdiction exists.

II. Whether federal courts may, consistent with Article III of the Constitution, exercise jurisdiction over disputes between a party properly before the court and a "pendent party" in the absence of an independent basis for federal jurisdiction.

III. Whether any limits exist on the power of a federal court to exercise jurisdiction, by means of a consent decree, over exclusively state law disputes between citizens of that same state.

PARTIES

The litigants before the Court of Appeals for the Third Circuit were the Sansom Committee, which was the plaintiff in the District Court and the appellee in the Court of Appeals, and The Trustees of the University of Pennsylvania, which was not a party (plaintiff or defendant) to the original litigation but which became a "party" to the Consent Decree entered by the District Court and which was the appellant in the Court of Appeals. Counsel for the Redevelopment Authority of the City of Philadelphia, a defendant in the District Court, entered an appearance but did not participate in the proceedings before the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, The Trustees of the University of Pennsylvania, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Third Circuit entered in three appeals in this proceeding on June 1, 1984.

OPINIONS BELOW

Three appeals were taken from orders in the District Court. The three opinions of the Court of Appeals, not yet reported, appear in the Appendix hereto. No opinion on the questions presented in this petition was rendered by the District Court for the Eastern District of Pennsylvania.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 1, 1984. A timely petition for rehearing *en banc* was denied on July 6, 1984, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign states, Citizens or Subjects. . . .

United States Code, Title 28:

§1331. Federal question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§1361. Action to compel an officer of the United States to perform his duty

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

United States Code, Title 42:

National Environmental Policy Act of 1969, 42 U.S.C. §4332(c): set forth in Appendix hereto.

National Housing Act of 1949, 42 U.S.C. §1441, *et seq.*: pertinent sections set forth in Appendix hereto.

STATEMENT OF THE CASE

The litigation from which this Petition for a Writ of Certiorari arises began with the filing of a complaint in June, 1973, by The Sansom Committee, an unincorporated group of residents and users of the 3400 block of Sansom Street in Philadelphia, Pennsylvania. [A-3].[1] These plaintiffs, opposed to the proposed demolition of the block contemplated by the then-existing redevelopment plan, challenged the plan by alleging violations of the National Housing Act of 1949 ("NHA"), 42 U.S.C. §1441 *et seq*., and §102(c) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §4332(c). [A-4].

The only defendants in the suit were the Redevelopment Authority of the City of Philadelphia ("RDA") and the United States Department of Housing and Urban Development ("HUD"). [A-3 to A-4]. These defendants were charged with failing to issue an environmental impact statement, failing to provide public participation in the redevelopment plans, failing to hold public hearings, failing to seek approval of local governing bodies, failing to insure conformity with community and regional plans, permitting acceptance of non-public contributions, failing to provide adequate relocation, and failing to preserve rehabilitable structures.[2] [A-7]. The District Court found that it had jurisdiction over these claims under Sections 1331 and 1361 of Title 28 of the United States Code. *The Sansom Committee v. Lynn*, 366 F. Supp. 1271, 1278-80 (E.D. Pa. 1973).

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1. Citations to the Appendix appear in the form "A-" followed by the page number. Most references to the Appendix refer to the opinion in appeal No. 83-1121 in the Court of Appeals for the Third Circuit. The issue of subject matter jurisdiction addressed in the opinion entered in appeal No. 83-1121 is applicable to all three appeals from the underlying action in the District Court (*see infra* note 5) and is the subject of the dissent in each of those appeals. This Petition, which is addressed to all three appeals below, raises only the issue of subject matter jurisdiction common to all three appeals as the basis of the request for the issuance of a Writ of Certiorari.

2. The Sansom Committee had raised a few other claims under NEPA and NHA, but these and the complaint's pendent claims were dismissed. [A-4]; *The Sansom Committee v. Lynn*, 366 F.Supp. 1271 (E.D. Pa. 1973). The pertinent sections of NEPA and NHA relating to the claims set forth in the text above appear in the Appendix hereto. [A-52 to A-60].

At the time the complaint was filed, the petitioner here, The Trustees of the University of Pennsylvania ("the University"), was the redeveloper for all properties on the block under a 1966 agreement with the RDA. The University, however, was not named as a defendant, and it was never alleged that the University had, or indeed could have, violated any of the requirements of the federal statutes pursuant to which the case was brought. RDA and HUD tried to take advantage of this omission by moving to dismiss the complaint on the grounds that the University was an indispensable party. The District Court denied this motion. [A-4]; 366 F. Supp. at 1280-81. The University, believing its interests to be affected, then sought twice to intervene in the case. These motions were also denied. [A-4 and A-27 n.5].

In December of 1980, the case was "settled" by means of a Consent Decree. That Decree made clear that the University — as to which no federal claim was or could have been asserted — was not a party to the litigation but was a party to the settlement.[3] [A-27 (Garth, J., dissenting)]. In fact, by the time of the settlement, the presence of any federal claim as to any party was doubtful inasmuch as the parties had agreed in 1976 not to demolish the block and the required environmental impact statement had issued. [*See* A-20 n.6 (Becker, J. concurring)]. In any event, it is undisputed that there was no diversity or federal question jurisdiction over any claim against the University at the time of the original settlement. [A-27 (Garth, J. dissenting)]. The Consent Decree, however, provided for ongoing federal court jurisdiction to enforce its terms. [A-13 (Becker, J. concurring)]. The University thus entered into a contract with the Sansom Committee and consented for purposes of the apparent settlement to ongoing federal court jurisdiction over that contract.

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3. Although signed by RDA and approved by HUD, the Decree was essentially a contract between the Sansom Committee and the University, who agreed to assign some of its redevelopment rights under specified conditions to the Sansom Committee by nominating some of its members as sub-redevelopers. [A-4]. As the Court of Appeals recognized, the matters involved in this Consent Decree are issues of state law. [A-6, A-11, A-18]. They are also unrelated to any federal interest. [A-18 (Becker, J. concurring)].

The importance of this provision became clear in 1982 when the Sansom Committee filed a motion to enforce the Consent Decree, contending that the University was failing to abide by its terms. During a hearing in the District Court, the Sansom Committee and the University agreed to modify substantially their previous agreement and a second Consent Decree was entered.[4] [A-4 and A-5]. Whereas the earlier agreement had been relatively limited in scope, the new Decree was an unusually detailed document, as Judge Becker recognized in his concurring opinion below:

> It is difficult to convey adequately the extent of the detail that is encompassed by the 1982 consent decree. The decree is several hundred pages long and sets out precise specifications for everything from the type of stone and wood that can be used in rehabilitating the houses to specifications for such concerns as "acceptable letter styles" on signs, etc., acceptable forms of "flags and banners," and methods of vermin control and refuse disposal. In addition, the agreement contains several 3 feet by 2 feet architect's plats, and literally dozens of blue prints for every possible structural detail of the houses, including, for example, the basement entrance, the roof deck and railing, the second story deck, the "light court stair," the "raised garden" and the front door (including the precise size and location of the postal numbers on the door). All this detail is fertile ground for future litigation between the parties and between the members of the Sansom Committee.

[A-16 n.4].

Within months this new agreement also collapsed when six Sansom Committee redevelopers (most of whom were University faculty) "withdrew" and new redevelopers (who were not University faculty) were named to replace them on the block. [A-5]. The University then moved to enforce the Consent De-

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4. The Sansom Committee and the University signed the 1982 Consent Decree, with RDA merely indicating its approval. HUD was not even a signatory on an "approval" basis. [A-5].

cree against the Sansom Committee. After a few months of discovery, the District Court denied this motion. [A-5]. On the same day the University's motion was denied, the District Court issued its own *sua sponte* modification of the Decree's terms, which modification was detrimental to the University's interests and was issued without any notice to the University. [Appeal No. 83-1120, *see* opinion at A-35]. Thereafter, the District Court issued yet another order modifying the terms of the Consent Decree pending appeal from its earlier orders. [Appeal No. 83-1253, *see* opinion at A-39]. The University appealed from all three orders.[5]

On appeal, the University raised, as it had done in the District Court prior to the entry of the third order involved in the appeals,[6] the issue of the court's lack of subject matter jurisdiction in the absence of a claim involving a federal question or of diversity of citizenship between the Sansom Committee and the University.[7] The Court of Appeals responded with three separate opinions. The majority rejected the University's position,

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5. The University filed appeals Nos. 83-1120 and 83-1121 on February 16, 1983 and No. 83-1253 on April 8, 1983.

6. The University never challenged the District Court's jurisdiction, to which it had concededly consented, until after that Court's *sua sponte* modification of the Decree. It then raised the issue in the District Court prior to the entry of that Court's second modification, which, unlike the first modification, was entered after notice and conference. The Court, however, declined to address the issue, which was pressed in all three of the University's appeals.

7. There is also no possibility of admiralty or maritime jurisdiction.

The grounds that do exist for jurisdiction where the claims do not involve federal questions and the parties are not diverse are not applicable in the instant case. Ancillary jurisdiction permits defending parties haled into federal court against their will to assert claims that otherwise have no federal jurisdictional base. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978). Parties may also be joined by means of impleader or intervention of right, neither of which is applicable here. *Id.* at 375 n.18 and 376. Pendent jurisdiction permits the plaintiff to join non-federal claims with the federal ones against parties already properly before the court. *See Aldinger v. Howard*, 427 U.S. 1, 14 (1976). The question here is whether these jurisdictional doctrines extend beyond these well-established bases to create pendent *party* jurisdiction, the joinder not only of a non-federal question but of an additional and non-diverse party.

holding that the terms of the Consent Decree were sufficiently related to the original causes of action set forth in the complaint against the original defendants to be within the court's subject matter jurisdiction and thus the joinder of an additional party, the University, for settlement purposes raised no question of subject matter jurisdiction.

It is this issue of subject matter jurisdiction, decided adversely to the University, that is the subject of this Petition for a Writ of Certiorari. The decision below contravenes decisions of this Court and conflicts with decisions of other Courts of Appeals on this important issue involving the limits of federal court jurisdiction.

REASONS FOR GRANTING THE WRIT

I. The Decision Below is in Direct Conflict With Decisions of this Court Regarding the Limits of Federal Jurisdiction.

The Court of Appeals for the Third Circuit held that the addition of the University as "a party to the Consent Decree," thus making it subject to ongoing federal court jurisdiction, raises no issue of subject matter jurisdiction — whether or not there is a federal question or diversity of citizenship — so long as the terms of the Decree are related to the causes of action set forth in the complaint.[8] [A-8 and A-9]. This decision permits the assertion of federal jurisdiction by means of a consent decree over a party as to whom no ground for jurisdiction exists, other than its consent. As such, it cannot be reconciled with the decisions of this Court in *Aldinger v. Howard*, 427 U.S. 1 (1976) and *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

8. Judge Seitz considers the issue to be the "jurisdictional limitations to what a district court may incorporate in a consent decree." [A-6]. Judge Becker in his concurring opinion agrees that the issue is the limitations on the scope of relief but states that "the question is not one of jurisdiction, but rather one of discretion and the scope of remedial power." [A-10 and A-15]. Judge Becker's statement is the more correct one if the issue were merely the extent of relief rather than the power to adjudicate and enter *any* relief. Relief beyond permissible limits constitutes an "error of decision" while lack of power to adjudicate renders the judgment void. *Swift & Co. v. United States*, 276 U.S. 311, 330 (1928).

Although the decision below avoids discussion of the issue, this Court's decisions make it clear that joinder of a party as to whom no independent basis of federal jurisdiction exists ("pendent party") does indeed raise a question of subject matter jurisdiction. *Aldinger v. Howard, supra.* In fact, the adjudication of non-federal questions between non-diverse parties already properly before the court raises a question of subject matter jurisdiction. *United Mine Workers v. Gibbs, supra.* The court below did not follow the standards set forth in those decisions for determining if subject matter jurisdiction exists over pendent claims and pendent parties. It ignored the question, preferring to view the case as one involving the permissible scope of a consent decree.

The fact that joinder of a new party in the present case took place at the time of the entry of the Consent Decree, rather than during the pleading stage, cannot change the jurisdictional result. The jurisdiction of the federal courts is equivalent to "their power to adjudicate." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167 (1939). It is beyond question that a consent judgment is an exercise of judicial power constituting an adjudication of the rights of the parties bound by it. *Pope v. United States*, 323 U.S. 1, 12 (1944); [A-23 and A-24 (Garth, J. dissenting)]. The question, therefore, is not whether there are limits to the scope of relief to be afforded, but rather whether there was power to adjudicate *any* disputes between the Sansom Committee and the University, a pendent party.

It follows that the reliance of the Court of Appeals on *Pacific Railroad v. Ketchum*, 101 U.S. 289 (1879), and similar cases, is unavailing because those cases deal with the scope of relief available under a consent decree in cases where the court had subject matter jurisdiction over the disputes between the parties to the decree at the time of its entry. Those cases manifestly do not support the proposition advanced below that a federal court has the power to enter a consent decree between a party and a pendent party so long as the terms of the decree are related to the causes of action set forth in the complaint. In fact, *Pacific Railroad*, in a separate discussion not cited below, specifically addressed the issue of the authority of the federal court

to enter any decree in that case. 101 U.S. at 297. Although the position of the *Pacific Railroad* parties in the pleadings did not support diversity jurisdiction, this Court held that the lower court had the power to ascertain the real dispute and rearrange the parties accordingly. When the lower court had exercised that power, there was complete diversity and jurisdiction thus existed. *Id.* at 298-99. As this Court specifically stated in *Pacific Railroad*:

> For the purposes of this appeal we need not inquire when the Circuit Court first got jurisdiction of this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered.

Id. at 298. In contrast, in the present case the District Court did not have jurisdiction over any dispute between the University and the Sansom Committee when it entered either of the consent decrees. The Court of Appeals for the Third Circuit, which relied almost entirely on *Pacific Railroad*, simply refused to comment on this fundamental difference in the cases.

If a federal court lacks jurisdiction over a dispute, it lacks jurisdiction to enter a settlement of that dispute as a consent judgment. The standards for determining whether jurisdiction over a dispute exists are the same at the time of entry of a consent decree as at the time of pleading. To hold otherwise conflicts with, and permits circumvention of, the requirements set forth in this Court's pendent party decisions in both federal question and diversity cases. *Aldinger*, *supra.*; *Owen Equipment & Erection Co. v. Kroger*, *supra.* It will be recalled that this Court refused in *Kroger* to permit parties to manipulate federal court procedures and create subject matter jurisdiction by suing only diverse defendants and waiting for them to implead the nondiverse defendants. The present case is similar. In effect, the lower court's decision permits parties to create subject matter jurisdiction by manipulation or consent provided only that they never formally file a pendent claim but wait to offer a contract resolving that claim to the federal court for entry as a consent decree.

If the court below had followed this Court's decision in *Aldinger*, it would have had to determine initially whether Congress has expressly or by implication negated pendent party jurisdiction over the University. 427 U.S. at 16-17. In doing so the court would have had to construe the reach of the jurisdictional statute, 28 U.S.C. §1331,[9] "in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress." 427 U.S. at 17. Not only did the Court of Appeals fail to make any such determination, but an analysis under the *Aldinger* standards would have inevitably led to the conclusion that neither the National Environmental Policy Act nor the National Housing Act carry with them a cause of action against the University. Those statutes include standards and requirements for certain governmental agencies to follow. Congress never in any way made them applicable to non-governmental entities. Because Congress never intended to make a non-governmental entity such as the University subject to an action brought under these acts, subject matter jurisdiction over any non-federal questions involving the University does not exist. [*See also* A-32 (Garth, J. dissenting)].

Even if it were found that Congress did not expressly or implicitly negate pendent party jurisdiction in the applicable statutes, federal court jurisdiction still has Constitutional limits. This Court in *Aldinger* did not reach the question whether Article III permits pendent party jurisdiction. But it is clear that the Article III requirements for pendent *party* jurisdiction can be no less stringent than the Article III requirements for jurisdiction over pendent *claims* as set forth in *Gibbs*. Therefore, the federal and non-federal disputes must derive from a "common nucleus of operative fact . . . such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding." *Gibbs*, 383 U.S. at 725. Only if the *Gibbs* test is satisfied do the federal and non-federal claims comprise "but one constitutional 'case' ". *Id*. The Court of Appeals for the Third Circuit did not apply this test but a far broader one: whether the terms of the

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9. It is readily apparent that 28 U.S.C. §1361 affords absolutely no basis for joinder of the University as a pendent party.

consent decree resolving the dispute between the Sansom Committee and the University come "within the general scope of the case made by the pleadings." [A-7, quoting *Pacific Railroad*].

Even if the present case did pass the statutory analysis test of *Aldinger*, it is evident that the federal and non-federal questions do not share a common nucleus of operative fact under the *Gibbs* standard, but instead are at most related sequentially. *See Bernstein v. Lind-Waldock & Co.*, No. 83-2420 (7th Cir. June 18, 1984). Redevelopment and ownership rights simply do not spring from the same nucleus of fact as the federal causes of action, namely the failure of governmental agencies to follow designated procedures including development and issuance of an environmental impact statement and citizen participation in the formulation of a redevelopment plan. Indeed, one assumes this was the very basis of the lower court's earlier decisions finding that the University was not an indispensable party and refusing to permit the University to intervene as a party in the case.

To permit this decision to stand will undermine the jurisdictional limits and standards set forth in *Aldinger*, *Kroger* and *Gibbs*. Parties, by manipulation or consent, will be able to accomplish at the time of judgment what they could not accomplish at an earlier stage of the proceeding. This Court should grant this Petition for a Writ of Certiorari to resolve the conflict with its decisions and curb this unwarranted expansion of federal jurisdiction.

II. The Decision Below Conflicts With Decisions of Other Courts of Appeals as to Whether Article III of the Constitution Permits Pendent Party Jurisdiction.

The decision below finds that the federal district court had jurisdiction over a dispute involving a pendent party. Even if the Court of Appeals for the Third Circuit had found jurisdiction under the standards set forth by this Court in *Aldinger* and *Gibbs* (which it did not attempt to do), its decision would still

conflict with those of other courts of appeals on the issue whether Article III permits pendent party jurisdiction.

Aldinger rested its decision of no federal jurisdiction over the pendent party on a statutory analysis. Thus, this Court did not reach the question whether the *Gibbs* standard relating to pendent claims is also sufficient for determining whether a pendent claim involving a pendent party falls within the jurisdictional grant of Article III. The decisions in the courts of appeals on this constitutional issue are not uniform.

Directly contrary to the decision below are the decisions of the Court of Appeals for the Ninth Circuit. That Court has consistently held that federal courts have no judicial power under Article III of the Constitution to join pendent parties absent an independent basis of federal jurisdiction. *Safeco Insurance Co. of America v. Guyton*, 692 F.2d 551 (9th Cir. 1982) (no jurisdiction over pendent parties joined as third party defendants to defendants' counterclaim); *Benson v. United States Small Business Administration*, 644 F.2d 1366 (9th Cir. 1981) (no pendent party jurisdiction over non-federal defendant); *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), *cert. dismissed*, 435 U.S. 982 (1978) (no power under Article III to exercise jurisdiction over a pendent party in an action brought against the United States under the Federal Tort Claims Act).

To like effect are the decisions of the Court of Appeals for the Seventh Circuit, which has endorsed its pre-*Aldinger* decisions that federal courts have no pendent party jurisdiction in federal question and diversity cases. Thus, in a diversity case, *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005 (7th Cir. 1982), that Court stated that "our re-examination persuades us that *Hampton* [holding that jurisdiction was lacking over state claims involving non-diverse parties in a federal question case] was decided correctly." *Hixon*, 671 F.2d at 1008, *citing Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974) and *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965) (also finding a want of jurisdiction over state law claims between non-diverse parties); *see also Padilla v. d'Avis*, 580 F. Supp. 403, 410 (N.D. Ill.

1984); *Lincoln Manufacturing Co. v. Stern*, 515 F. Supp. 21 (N.D. Ill. 1981).[10]

In post-*Gibbs* but pre-*Aldinger* and pre-*Kroger* actions, the Court of Appeals for the Fourth Circuit refused to permit pendent party jurisdiction in diversity cases. *Parker v. W.W. Moore & Sons, Inc.*, 528 F.2d 764 (4th Cir. 1975); *Kenrose Manufacturing Co. v. Fred Whitaker Co.*, 512 F.2d 890 (4th Cir. 1972). On the basis of these decisions, a recent district court decision in a federal question case, although finding that Congress had not negated pendent party jurisdiction, dismissed the claim against the pendent party finding that the Fourth Circuit "inclines" toward the view of the Ninth Circuit regarding pendent party jurisdiction. *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692 (D. Md. 1981).

Other courts of appeals have held, however, that the addition of a pendent party as well as a pendent claim does not change the standard for determining whether a "case" in the constitutional sense exists. *Federal Deposit Insurance Corp. v. Otero*, 598 F.2d 627, 631 (1st Cir. 1979). Under this theory, the standards set forth in *Gibbs* apply for determining whether Article III permits pendent party jurisdiction in the factual context before the court. *Id.*; *Lykins v. Pointer, Inc.*, 725 F.2d 645 (11th Cir. 1984); *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982).[11]

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10. A more recent decision of the Court of Appeals for the Seventh Circuit discusses pendent party jurisdiction generally. While noting that pendent party defendant jurisdiction survives in the admiralty field, the court mentions that this Court's decisions have left open the question whether "the pendent party concept retains any vitality today." Because the claims did not meet the *Gibbs* standard, the court did not render any decision regarding the reach of federal court jurisdiction over pendent parties. *Bernstein v. Lind-Waldock & Co.*, *supra*.

11. The inconsistencies among the courts of appeals are starkly apparent in cases deciding whether a federal court can exercise jurisdiction over claims against pendent parties in actions brought under the Federal Tort Claims Act over which federal court jurisdiction is exclusive. *Lykins* and *Stewart* have permitted pendent party jurisdiction. Other courts have reached the opposite conclusion. *Kack v. United States*, 570 F.2d 754 (8th Cir. 1978); *Ayala v. United States*, *supra*.

Because *Aldinger* addressed only statutory considerations, uniformity is lacking in the decisions of the courts of appeals on the constitutionality of pendent party jurisdiction.[12] While the Courts of Appeals for the Fourth, Seventh and Ninth Circuits have either expressly stated, or inclined toward, the view that pendent party jurisdiction is beyond the scope of Article III, the Courts of Appeals for the First, Tenth and Eleventh Circuits have exercised pendent party jurisdiction applying the "constitutional test" used for pendent claims in *Gibbs*.

In its decision below, the Court of Appeals for the Third Circuit goes beyond *Gibbs*, finding joinder of a pendent party to be permissible so long as the subject matter involving that party comes "within the general scope of the case made by the pleadings" involving the other parties. After extensive research, petitioner believes that it is correct to say that no United States court has ever voiced so expansive an interpretation of its jurisdictional authority over a pendent party.

This Court should grant this Petition for a Writ of Certiorari to resolve the conflict and achieve uniformity among the courts of appeals on the issue of pendent party jurisdiction.

III. The Question Raised in this Petition is One of Exceptional Importance: the Improvident Expansion of Federal Jurisdiction.

Federal courts are courts of limited jurisdiction. The maximum extent of a federal court's power to adjudicate disputes is set forth in Article III of the United States Constitution. Parties cannot by consent or conduct confer subject matter jurisdiction

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12. There is also confusion concerning the application of *Aldinger's* statutory analysis rule outside the context of §§1343(3) and 1983, to which *Aldinger* is limited. Some courts include only the jurisdictional statute in their analysis, *Boudreaux v. Puckett*, 611 F.2d 1028, 1031 (5th Cir. 1980); *Lykins*, 725 F.2d at 648-49, while others include both the jurisdictional statute and the statute on which the claim is based, finding that the *Aldinger* rule concerning the scope of the cause of action would otherwise be meaningless, *Charles D. Bonanno Linen Service, Inc. v. McCarthy*, 708 F.2d 1, 8 (1st Cir.), *cert. denied*, 104 S. Ct. 346 (1983). Thus a need also exists to unify these discordant views regarding the application of the *Aldinger* rule.

on a federal court unless Article III encompasses and Congress confers such jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

This Court has mandated that this limited jurisdiction of the federal courts must be "carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951). The limits, "whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Kroger*, 437 U.S. at 374. The court below both disregards these limits and permits parties to evade them. This wrongful extension of federal jurisdiction warrants this Court's supervisory intervention.

As Judge Becker in his concurring opinion forthrightly realized, "this case demonstrates the potential for federal court involvement in matters that should be relegated to state courts." [A-10]. By its decision the Court of Appeals for the Third Circuit has permitted the district court wide discretion resulting in the exercise of jurisdiction over a pendent party after the dissipation of the federal interest. [A-16 (Becker, J. concurring)]. The decision has also sanctioned the ongoing supervision by a federal court of a legion of non-federal issues (between non-diverse parties) that bear no relationship to any conceivable federal interest. [A-18 and A-19 (Becker, J. concurring)]. Indeed, the issues dividing the parties relate solely to real property questions involving a single block in West Philadelphia. Such unauthorized and unwarranted involvement in state law matters not only infringes on the territory of the states but "reduces the ability of the federal courts to grant prompt and full relief in other cases" [A-18, (Becker, J. concurring)] where their expertise is needed to interpret federal law.

This Court has realized that pendent party jurisdiction is a "subtle and complex question with far-reaching implications," *Aldinger*, 427 U.S. at 2, *quoting Moor v. County of Alameda*, 411 U.S. 693, 715 (1973). The granting of a Writ of Certiorari is necessary, therefore, in order to curb the "far-reaching implications" of the decision below and guard the constitutional and statutory limits of federal jurisdiction in order that the federal

courts do not act in the absence of constitutionally-sanctioned judicial power.

If a federal court lacks jurisdiction over a dispute, it lacks jurisdiction to enter a settlement of that dispute as a federal court decree. Because district courts are often presented with consent decrees, this Court should make it clear that the limits of federal jurisdiction apply to the entry of a settlement decree as well as to one not the product of the parties' consent.

To allow the decision below to stand will provide a mechanism by which parties can, by manipulation or consent, confer jurisdiction upon a federal court at the time of judgment, thereby circumventing the established limits of federal jurisdiction. It is the obligation of this Court to refuse to permit this "wrongful extension of federal jurisdiction." *American Fire & Casualty Co. v. Finn*, 341 U.S. at 17-18.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgments and opinions of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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84-232

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CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1984

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,
Petitioner,

v.

THE SANSOM COMMITTEE,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1121

THE SANSOM COMMITTEE, an unincorporated association, appearing by ELLIOT C.R. COOK, trustee ad litem, WILLIAM B. BOLTON, MICHAEL KARP, ROBINSON FREDENTHAL, NICOLES, INC., CAMPUS PHARMACY, INC., JOHN McCOUBREY,

Appellee,

v.

JAMES LYNN, individually and as Secretary, Department of Housing and Urban Development, JOSEPH LaSALA, THE REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,

Appellant.

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania

(D.C. Civ. No. 73-1444)

Argued December 13, 1983

Before: SEITZ, *Chief Judge,*
GARTH and BECKER, *Circuit Judges*

(Opinion Filed June 1, 1984)

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OPINION OF THE COURT

SEITZ, *Chief Judge*.

I.

The Trustees of the University of Pennsylvania (the "University") appeal from the February 10, 1983 order of the district court denying the University's "motion to enforce" a consent decree. We have appellate jurisdiction under 28 U.S.C. §1291 (1976). This appeal will be designated as *Sansom I* to distinguish it from *Sansom Committee v. Lynn*, No. 83-1253 (*Sansom II*), filed contemporaneously.

II.

FACTS

This appeal is a small sample of the unbridled litigiousness that has kept these parties in court for almost two decades. The Sansom Committee (the "Committee") is an unincorporated association of residents and users of the 3400 block of Sansom Street, located in West Philadelphia, adjacent to the University of Pennsylvania. The Redevelopment Authority of the City of Philadelphia (the "Redevelopment Authority") acquired the block by condemnation almost twenty years ago and, in conjunction with the Department of Housing and Urban Development ("HUD"), planned to demolish the structures on the block. The University acquired the redevelopment rights to the block and expected to buy the properties and to build an academic building.

Within a few years, the University changed its plans and proposed to transfer its redevelopment rights to a commercial developer. The Redevelopment Authority and HUD (collectively, the "Agencies") approved this modification of the redevelopment plan. In 1973, however, the Committee brought an action in the district court against the Agencies in an effort to stop the proposed demolition and commercial redevelopment. The Committee's underlying purpose was to

rehabilitate the existing townhouses and to maintain their mix of residential and low-volume commercial uses.

The Committee alleged that the Agencies violated the National Environmental Policy Act of 1969, 42 U.S.C. §§4321 to 4361 (1976) ("NEPA"), and the National Housing Act of 1949, 42 U.S.C. §§1441 to 1490h (1976) ("NHA"), when they approved the modification of the redevelopment plan. Certain of the Committee's claims were dismissed on motion by the Agencies. The Agencies also moved to dismiss the action for failure to join an indispensable party, i.e., the University. The district court held that although the University had an interest in the outcome of the action, it was not an indispensable party. *See Sansom Committee*, 366 F.Supp. 1271, 1281 (E.D. Pa. 1973). The district court denied the University's subsequent petitions to intervene in the action.

After several further confrontations in the district court,[1] the Committee and the Agencies stipulated that they had "engaged in serious and fruitful settlement negotiations in consultation with the University of Pennsylvania" and that these discussions had led to a new proposal for the redevelopment of the block. The district court agreed to suspend the action while the parties finalized a settlement.

The parties settled the action, and the district court entered a consent decree (the "1980 Consent Decree") which contained the terms of the settlement agreement. Under the 1980 Consent Decree, the Redevelopment Authority was to sell Sansom Street properties to parties designated by the Committee, and the University agreed to nominate the designated parties to redevelop those properties in the University's stead. The Committee, the University, and the Redevelopment Authority signed the 1980 Consent Decree, and HUD consented to its entry.

Within months, the decree "unravelled," as the University says. The University claims that both it and the Committee wanted to make changes in the decree. The Commit-

1. *See Sansom Committee v. Lynn*, 382 F.Supp. 1245 (E.D. Pa. 1974); *Sansom Committee v. Lynn*, 382 F.Supp. 1242 (E.D. Pa. 1974).

tee claims that the University's "stalling tactics" inspired the Committee to move for enforcement of the decree. Amidst this unravelling, the district court in March 1982 entered an order that named the Committee's designees. After further negotiations, the University and the Committee reached an agreement that included newly negotiated covenants, the 1980 Consent Decree, and other agreements between the University and the Committee. These matters were incorporated in a new consent decree (the "1982 Consent Decree"), which the Committee and the University signed. The Redevelopment Authority consented to the entry of the 1982 Consent Decree.

Subsequently, the Committee advised the University that some of its designees wished to withdraw from the redevelopment project. The Committee proposed replacement designees. In response, the University filed a "motion to enforce" the 1982 Consent Decree. In this motion, the University requested the court to substitute the University as the redeveloper of the properties that the withdrawing designees were to have received. The district court denied this motion, and the University appeals.

III.

JURISDICTION OVER CONSENT DECREE

The University raises for the first time on appeal the contention that the district court lacked subject matter jurisdiction[2] to enter the 1980 Consent Decree. Although this is an appeal from the denial of the University's motion to enforce the 1982 Consent Decree, we may consider the University's jurisdictional challenge to the 1980 Consent Decree because the 1982 Consent Decree is essentially a modification of the 1980 Consent Decree,[3] and the validity of the

2. Personal jurisdiction over the University is not at issue.

3. A court possesses inherent power to modify its consent decree. *Delaware Valley Citizens' Council v. Pennsylvania*, 674 F.2d 976, 980 (3d Cir.), *cert. denied*, 103 S.Ct. 206 (1982).

1982 Consent Decree depends on the validity of the 1980 Consent Decree. It is not contested that we must address this issue even though the University consented to the entry of the decrees.

The district court clearly had federal question jurisdiction in 1973, at the outset of the action between the Committee and the Agencies based on the federal statutes invoked. The University contends that the district court lacked federal question jurisdiction in 1976 because HUD filed an environmental impact statement dated in that year. Even if the environmental impact statement satisfied HUD's responsibilities under the NEPA, it left intact the Committee's pending federal claims against the Agencies under the NHA. Consequently, the district court still had subject matter jurisdiction when it considered the entry of the 1980 Consent Decree.

The University's principal argument is that the district court had no subject matter jurisdiction to enter the 1980 Consent Decree because its terms incorporated essentially state law relief. More generally, the issue is whether there are jurisdictional limitations to what a district court may incorporate in a consent decree, and if so, whether the district court transgressed those limits.[4]

Consent decrees need not be limited to the relief that a court could provide on the merits. As the Supreme Court long ago explained:

> Parties to a suit have the right to agree to anything they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings.

Pacific Railroad v. Ketchum, 101 U.S. 289, 297 (1879); *see Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983); *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 799-800 (10th Cir. 1979), *cert. denied sub nom. Court-*

4. The parties analyze the jurisdictional question under the tenets of pendent and ancillary jurisdiction, but we find these doctrines inapposite.

wright v. EEOC, 446 U.S. 952 (1980); 1 *Hogg's Equity Procedure* §582 at 707 (3d ed. 1943); 3 *Freeman on Judgments* §1349 at 2772 (1915); 2 *Black on Judgments* §705 at 843 (1891) (citing cases for and against); *cf. Alliance to End Repression v. City of Chicago*, ___ F.2d __, ___ (7th Cir. 1984); *Swift & Company v. United States*, 276 U.S. 311, 329-31 (1928).

We recognize that some consent decrees may be beyond the power of a federal court to approve. *See Safeway Stores*, 611 F.2d at 795; *Jordan v. School District*, 615 F.2d 85, 91 (3d Cir. 1980) (Rosenn, J., concurring). Thus, a district court cannot wield its equitable power beyond the realm of its federal subject matter jurisdiction. *E.g., Gordon v. Washington*, 295 U.S. 30, 36 (1935); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 737, 740 (E.D.N.Y. 1979), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chemical Company*, 454 U.S. 1128 (1981). Nevertheless, as long as the terms of a consent decree come "within the general scope of the case made by the pleadings," *Pacific Railroad, supra*, it will be within the district court's power to enter the decree, if the pleadings state a claim over which a federal court has jurisdiction.

In addition to the claims that the district court dismissed, the Committee alleged that the Agencies violated the NEPA by failing to issue an environmental impact statement and by failing to hold a hearing on the possibility of rehabilitation; that the Agencies violated the NHA by permitting non-public contributions; and that the Agencies violated the NHA by failing to provide citizen participation in the redevelopment, hold public hearings and seek the approval of local governing bodies, insure conformity with community and regional plans, and provide adequate relocation. *Sansom Committee v. Lynn*, 366 F. Supp. at 1281.[5]

The terms of the 1980 Consent Decree set out in detail a cooperative plan for the rehabilitation and use of the Sansom

5. The Committee's claim that the Agencies violated the NHA by failing to preserve rehabilitable structures also appears to have survived the motion to dismiss. *See Sansom Committee*, 366 F. Supp. at 1276.

Street properties. Although the terms of the decree far exceeded the relief available under the NEPA and the NHA,[6] the decree was directly responsive to the Committee's complaint under these statutes. Thus, under the 1980 Consent Decree, the properties would be rehabilitated with maximal participation by interested members of the public. This is consonant with the general policies and goals of the NEPA, *see* 42 U.S.C. §§4321, 4331; *Sansom Committee*, 366 F. Supp. at 1274 (purpose of the NEPA is to require federal agencies to consider local environmental consequences of their projects), and of the NHA, 42 U.S.C. §§1441, 1441a (the NHA encourages rehabilitation and community participation in redevelopment); *see Shannon v. HUD*, 436 F.2d 809, 818 (3d Cir. 1970) (residents, business owners, and representatives of private civic groups have standing under the NHA to challenge the modification of a redevelopment plan). We conclude that the terms of the 1980 Consent Decree were sufficiently related to the Committee's federal causes of action to permit the district court to enter the decree without overstepping its subject matter jurisdiction.

The University also argues that the district court had no power to enter a consent decree signed by a non-party to the underlying action.[7] Since, in our view, the decree met the

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6. The University does not contend that the district court abused its discretion in approving the terms of either the 1980 or the 1982 Consent Decrees. Indeed, there is a serious question as to whether the University would have the right to make such a contention.

7. The University cites *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 469 F. Supp. 836 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980). The court in *Metropolitan Housing* held that a consent decree may include anything to which "the parties" may contract. *Id.* at 854-55 n.20. The court did not decide whether, if "the parties" are parties to the consent decree, they must also be parties to the underlying action. We also note that the holding in *Metropolitan Housing* appears to be much broader than our holding under *Pacific Railroad*.

Regardless of the University's status in the underlying action, its participation in the 1982 Consent Decree gives it standing to bring this appeal.

requirements of *Pacific Railroad*, we fail to see how this argument raises a question of subject matter jurisdiction. Finally, the University challenges the district court's power to construe, modify, or enforce the consent decrees. These arguments, however, are predicated on the court's supposed lack of jurisdiction to enter the 1980 Consent Decree, which we reject.

IV.

MERITS

We must now decide whether the district court correctly declined to substitute the University for the Committee's withdrawing designees. Consent decrees are construed as contracts. *Fox v. HUD*, 680 F.2d 315, 319 (3d Cir. 1982). If a district court's construction of a contract involves no factual issues, our standard of review is plenary, but findings of fact must be left intact unless they are clearly erroneous. *See Barco Urban Renewal Corporation v. Housing Authority*, 674 F.2d 1001, 1008 (3d Cir. 1982).

Neither the 1980 Consent Decree nor the 1982 Consent Decree addresses the question of the replacement of withdrawing designees. The district court held that a provision that empowers the University to purchase a property if "no designee of the Sansom Committee shall elect to purchase [that] property" also implies that the Committee may designate more than one person to purchase a property. The court also held that nothing in the 1982 Consent Decree refers to the specific designees named in the court's order of March 1982. Finally, the district court viewed the decree in light of the court's experience with its drafters and concluded that if the drafters had intended that the University be entitled to purchase a property after an initial designee withdraws, the decree would have so provided. We agree with the district court's construction of the 1982 Consent Decree.

V.

The district court's order dated February 10, 1983, denying the University's "motion to enforce" the consent decree, will be affirmed.[8] Costs will be taxed against the appellant.

BECKER, *Circuit Judge*, concurring:

I agree with Chief Judge Seitz's analysis of the questions of subject matter jurisdiction and jurisdiction over the parties. I also agree with the Chief Judge's analysis of the merits. I therefore concur fully in his opinion.

I write separately to address the question of the limits on the scope of federal equitable remedial power. More specifically, in a case such as this, where the original issues that gave rise to federal subject-matter jurisdiction are no longer in dispute, and where a consent decree negotiated by the parties calls for continuing and extensive federal supervision over what are essentially state-law property and contract issues, the question arises whether there are prudential limits on the district court's power to approve the decree.

This issue was not raised by the parties, either before the district court or on appeal, nor was it raised by the district court *sua sponte*. The issue ordinarily, therefore, would not merit my writing separately. Because, however, this case demonstrates the potential for federal court involvement in matters that should be relegated to state courts, because appellate courts will seldom have the issue squarely before them — the parties may be estopped from arguing that the district court abused its discretion in approving a *consent* decree, — and because, as a former district judge, I recognize that district judges are often chary of upsetting a settlement by refusing to approve terms of a negotiated decree, I take the liberty of advancing, for consideration of the district courts in the fashioning of consent decrees, at least one possible approach to this problem.

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8. We deny the Committee's request that this appeal be dismissed for an alleged failure to follow the rules of appellate procedure.

As I see it, the potential issue as presented by this case is whether, because the federal question that gave rise to this suit had long been settled, the district court could have been charged with exceeding allowable discretion when it approved consent decrees in 1980 and 1982 that provided for continuing federal supervision to settle any disputes that might arise between the parties out of the consent decrees. The legal issues likely to be involved in the interpretation and enforcement of the decrees were classically questions of state contract and property law — matters in which the federal government, because there is no diversity of citizenship between the parties, has no interest. As I have suggested, there are limits on the discretion of the district court to involve itself in the resolution of non-federal disputes under the guise of enforcing a consent decree where the issues which gave rise to the federal court's subject-matter jurisdiction are no longer in dispute. Where those limits are exceeded, I believe that the district court should remit the parties to state court to enforce their agreement.

In order adequately to explain my position, I must develop the facts and procedural history in somewhat more detail than was necessary for Chief Judge Seitz. I turn now to that task.

I.

As the Chief Judge explained in the majority opinion, the origins of this litigation stretch back to the early 1960s when the City of Philadelphia, through its agent the Redevelopment Authority (RDA), exercised its powers of eminent domain to purchase substantial tracts of land containing substandard dwellings around the campus of the University of Pennsylvania. The dual purpose of these acquisitions was to eliminate urban blight by tearing down the offending structures and to provide land to the University for its planned expansion over the following decade.

Neither of these goals was immediately realized. The University apparently overexpanded and therefore did not

need the additional land between Sansom and Walnut Streets at 34th Street. Therefore, instead of razing the houses, the RDA became a landlord. By the early 1970s, the University decided it did not need the land, and therefore proposed to the RDA that a commercial developer be chosen to build on it. By this time, however, fashions in urban renewal had changed. The structures that in the 1960s had been considered examples of urban blight, were, with the gentrification movement of the 1970s, highly desirable shells that, with rehabilitation, had the potential to be very expensive townhouses. Consequently, the residents of the houses, who were renting from the RDA, opposed the University's plan to nominate a commercial developer. These residents formed the Sansom Committee for the ostensible purpose of preventing the RDA from changing the character of the neighborhood from residential to commercial. As an alternative to the University's plan, the Committee proposed that its members be given the right to purchase the houses from RDA, and to redevelop them themselves.

In 1973 the Sansom Committee brought suit in federal court alleging that the RDA's plan to tear down the houses violated the National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4361 (1976) ("NEPA"), and the National Housing Act of 1949, 42 U.S.C. §§1441-1490h (1976) ("NHA"). The Committee was unsuccessful in preventing the City from tearing down the houses on the 3400 block of Walnut Street, but eventually obtained an injunction temporarily saving the houses on Sansom Street. In 1976 the Committee, the University, and the RDA reached an agreement in principle not to tear down the houses, and the district court placed the case on its supense docket. With this agreement, the federal interest — preserving the residential character of the neighborhood — was essentially satisfied.[1] The remaining issue, in

1. To underscore, I agree completely with Chief Judge Seitz that the district court did not "lose" subject matter jurisdiction in 1976, or at any other time. There still remained several federal law issues to be litigated in 1976, including a contempt action that was pending against the RDA, and plaintiffs' claims for attorneys' fees. In addition, because the RDA and

addition to the signing of a formal settlement agreement, was the question of who should be permitted to buy the houses from the RDA, and under what conditions.

Four years later, in December of 1980, the parties informed the district court that they had committed an agreement to writing, which they styled a "consent decree." This agreement essentially provided that the University would nominate individuals designated by the Sansom Committee to rehabilitate the houses on Sansom Street, and that these nominees would be given the right to purchase the houses from the RDA at prices substantially below market cost. The agreement also provided that the district court would retain jurisdiction to oversee its implementation. The University, the Sansom Committee, and the RDA all signed this agreement, and the district court approved it on January 12, 1981. A second "side agreement," signed by the University and the Sansom Committee, listed the individuals who were designated to rehabilitate the properties, and bound these individuals to abide by very detailed redevelopment criteria. This side agreement also set out a number of restrictions and limitations on the title the designees would receive. This agreement was not part of the "consent decree," and the district court retained no jurisdiction to enforce it.

Rather than settling the case, the signing of this consent decree set off a new round of disputes between the University and the Sansom Committee, and among the members of the Sansom Committee. At least four members of the Sansom Committee felt that their interests had not been represented by the Committee's negotiators. These members unsuccessfully tried to intervene before the district court in order to protect their interests. In addition, Michael Karp, one of the named plaintiffs in the original action, unsuccessfully tried to block approval of the consent decree by the district court. Karp appealed the district court's approval of the consent

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the University were still free to change their respective minds until they actually signed a settlement agreement, one cannot fairly say that the federal claims were moot.

decree to this Court, and we affirmed the district court. Subsequently, Karp has continued to litigate in federal court. Today we have rejected four of his appeals arising out of his dispute with the Sansom Committee. In addition, Karp has filed two suits in state court. One suit alleged breach of fiduciary duty against the Sansom Committee, its "trustee *ad litem*" Elliott C. R. Cook, the University, and the RDA; the other suit alleged malpractice and fraud against Sansom Committee counsel.

In addition to the intra-Sansom Committee squabbles, the agreement between the Sansom Committee and the University became "unravelled" by the late summer of 1981, with both parties seeking changes to their 1980 agreement, and the University filing a motion to enforce in the district court. Eventually, the University and the Committee agreed to a new settlement, which they signed on April 7, 1982. This new agreement modified the first consent decree in several ways. The University was granted a right of first refusal to purchase the homes on Sansom Street whenever the purchasers designated by the Sansom Committee decided to sell. In addition, the new agreement incorporated an amended version of the 1980 side agreement between the University and the Sansom Committee, including detailed specifications for rehabilitating the houses and a declaration of easements and restrictions. This second agreement, which is an inch and a half thick and has aptly been characterized by counsel for the University as a "code of federal regulations" for the rehabilitation of the houses on the south side of the 3400 block of Sansom Street, specifically declared that the district court was to retain jurisdiction to supervise its implementation and enforcement.[2] This revised consent decree was approved by the district court on August 12, 1982.

Unfortunately, the second decree was no more successful than the first in ending the parties' disputes. The Committee and the University immediately began fighting over such

2. See *infra* note 4 and accompanying text.

questions as who were proper designees, by what date the designees had to purchase the houses from the RDA, and what the consequences were if some of the designees failed to purchase the houses "in time." As provided by the decree, the parties returned to the district court to resolve their disputes. The district court decided the disputed issues, generally favorably to the Sansom Committee. The present appeal is from these decisions.[3]

II.

The interesting and difficult point is whether all of this infighting over the redevelopment of the 3400 block of Sansom Street belongs in federal court. Judge Garth apparently shares this concern, but characterizes the issue as one of "jurisdiction." I believe, on the other hand, that the question is not one of jurisdiction, but rather one of discretion and the scope of remedial power. Specifically, the problem is whether the district court should have agreed to oversee the implementation and enforcement of the settlement agreements.

My analysis begins with my belief that it is wasteful and inappropriate for the federal courts to be spending time on a case such as this. The current dispute between the University and the Sansom Committee is solely one of contract interpretation which would ordinarily be a question of state law. Because there is no diversity of citizenship among the parties, the only federal interest in this case is based on the claims of

3. In addition to the University versus Sansom Committee disputes, the district court continued to be occupied by intra-Sansom Committee litigation. Besides the Karp litigation, which continued (and continues), H. Clayton Cook, the brother of Elliott Cook, the "trustee *ad litem*" of the Sansom Committee, intervened in the federal action claiming that he (not Elliott Cook) was the real owner of La Terrasse Restaurant, the entity that occupied three of the houses on Sansom Street and apparently that was the principle source of funds for the litigation. This matter ended up in litigation styled Cook v. Cook v. Dechert, Price & Rhoads, No. 82-?°53 (E.D. Pa. 1983), which was tried in March of 1983, and ultimately settled in favor of the defendants.

the Sansom Committee that the original plan to tear down the houses on the 3400 block violated a federal statute requiring that there be "community input" before a federally funded urban renewal project changed the character of the neighborhood from residential to commercial. Since none of the parties to the current litigation has any intent of tearing down the houses, this federal interest has essentially dissipated. On the other hand, if the district court continues to exercise supervision over the settlement agreement, it will be required to interpret a "code of federal regulations" for the rehabilitation of the houses on the south-side of the 3400 block of Sansom Street. At oral argument, counsel for the University indicated that, if we upheld the district court's power to superintend this consent decree, a myriad of motions would be filed with the district court requesting the court to interpret the incredibly detailed structural specifications for rehabilitation of the houses. For example, counsel stated that the parties presently dispute the meaning of the building height limit contained in the specifications: the 3400 block of Sansom Street is on a hill and the parties cannot agree as to whether the height limit is to be measured from the low-end or high-end of the block, or from multiple points in between.[4] Oral Argument Transcript, at 48. The task of resolving all of these disputes as to the meaning of the 1982

4. It is difficult to convey adequately the extent of the detail that is encompassed by the 1982 consent decree. The decree is several hundred pages long and sets out precise specifications for everything from the type of stone and wood that can be used in rehabilitating the houses to specifications for such concerns as "acceptable letter styles" on signs, etc., acceptable forms of "flags and banners," and methods of vermin control and refuse disposal. In addition, the agreement contains several 3 feet by 2 feet architect's plats, and literally dozens of blue prints for every possible structural detail of the houses, including, for example, the basement entrance, the roof deck and railing, the second story deck, the "light court stair," the "raised garden" and the front door (including the precise size and location of the postal numbers on the door). All this detail is fertile ground for future litigation between the parties and between the members of the Sansom Committee.

consent decree would clearly place a severe burden on the time of the district court, and ultimately of this court on review.

Of course if this effort was necessary to implement a decree protecting federal rights, it would be appropriate for the federal courts to expend it. When a federal statute or constitutional provision has been violated, the federal courts have broad equitable power to formulate remedies in order to correct the violation, and to supervise the implementation of those remedies.[5] *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 2 (1971). This equitable remedial power, however, is not unlimited. *Milliken v. Bradley*, 418 U.S. 717 (1974). There should be prudential limits, and at some point there certainly are constitutional limits, on the scope of that power. The existence of a federal statutory or constitutional issue demanding a remedy does not give a federal judge a roving commission to adjust all disputes of whatever nature involving — however tangentially — the parties and those in proximity to them. Nor can parties expand the district court's equitable remedial power by consent. The difficult task is to set forth a principled basis for limiting the range of disputes into which the federal courts can be dragged by means of an overly broad consent decree, while at the same time protecting the power of the courts to implement broad equitable remedies where it is useful in protecting federal rights.

The problem in this case is that the matters to be adjudicated are essentially of state interest. Regardless of the

5. Examples of far-reaching remedial orders are most often found in antitrust, labor law, securities law, prisoners' rights, mental health, and school desegregation cases. For a list of the extraordinary forms of relief ordered by federal courts to remedy violations of the securities laws, *see* Farrand, *Ancillary Remedies in SEC Litigation*, 89 Harv. L. Rev. 1779 (1976). In this article, Mr. Farrand argues that federal remedial power should be limited by three requirements: the relief must be *consistent* with the goals of the statute that has been violated; the relief must be *necessary* to accomplish a legitimate goal of the statute; and, on *balance*, the benefits of granting the proposed relief must outweigh the negative consequences. *Id.*

outcome of the present and potential disputes in this case, the residential character of the 3400 block will not be affected. The resolution of these disputes, therefore, in no way affects any federal interests. The only reason that the disputes can be brought in federal court is that the agreement settling the original federal suit provided for continuing federal supervision. I do not believe that precious federal resources should be wasted adjudicating such matters.

My purpose in writing this concurrence is to propose an analytical framework for distinguishing such unworthy cases from the cases where broadly exercised federal equitable remedial power is desirable. My starting point is a desire to maximize the effectiveness of the federal courts in adjudicating claims and granting full relief in cases where Congress and the Constitution have granted us jurisdiction. Federal courts will often need to superintend broad equitable remedies in order to ensure that the underlying federal rights are fully vindicated. Moreover, district judges should generally possess broad discretion to determine what relief is appropriate in any particular case. It is generally impossible for Congress to predict beforehand what relief will be required in specific cases, and it is not always easier for appellate courts to anticipate future cases in deciding those before them. Because of these concerns, I want to be certain that any test limiting federal equitable remedial power does not intrude upon the ability of district courts to grant effective remedies.

On the other hand, there comes a point where superintendency over proposed relief is of only marginal value in preserving the underlying federal rights for which Congress provided a federal forum and where the time required by this superintendency reduces the ability of the federal courts to grant prompt and full relief in other cases. The district judge is generally in the best position to determine when this point is reached, and should thus be accorded substantial deference by appellate tribunals. Appellate tribunals should supervise the exercise of that discretion, however, because district court decisions in this area affect more than the judge and litigants in the individual case; decisions have institutional

consequences as well. I would suggest, therefore, the following modest standard for determining the propriety of federal-court remedial orders:

> A federal court may in the sound exercise of its equitable discretion retain continuing authority over implementation of a relief decree only when the court finds that:
>
> (a) this continuing federal supervision will probably further in some significant way a federal interest identified by statute or the constitution; or
>
> (b) continuing supervision is not likely to divert substantial resources away from claims arising under clear constitutional and statutory grants of jurisdiction; or
>
> (c) the unavailability of such relief is likely to deter potential litigants from bringing suits over which there is properly jurisdiction in federal court.

It is important to emphasize that this test does not in any way limit the ability of parties to include anything they desire in settlement agreements, and to enforce those agreements as contracts in state court. The test limits only the power of federal courts to approve a settlement agreement that calls for *continuing federal supervision* over its enforcement and implementation. Moreover, the proposed test will not encumber the power of the federal courts to grant complex remedies requiring continuing judicial supervision in areas such as desegregation and prison reform. In those areas, complex relief is clearly necessary to vindicate federal rights, and disputes concerning the implementation of the relief granted will usually grow out of the facts underlying the original lawsuit, and thus not require the court to continually delve into independent disputes unrelated to any substantial federal interest.

III.

Because the question of limits on federal remedial power was never raised by the parties or the district court, I do not

decide whether, on the facts of this case, the district court abused its discretion when it approved the consent decree. However, neither can I leave the test I have proposed in a vacuum, devoid of any application to a specific fact situation. Thus, in order to flesh out my proposed test, I will briefly illustrate how it might apply here.

While I agree with Chief Judge Seitz that community participation in redevelopment and rehabilitation is generally consistent with the purposes of the NHA, much of the litigation that has arisen or is likely to arise under the consent decrees here resembles an only-somewhat more civilized version of Filene's basement: a scramble over who is entitled to buy houses at bargain prices from the RDA. Obviously, within broad limits, the outcome of this donnybrook does not directly involve any question of federal law.[6] In addition, continuing federal supervision over implementation and enforcement of the 1982 consent decree, which is not limited to the sale of the houses to Sansom Committee designees (as the 1980 decree was), but instead contains a detailed rehabilitation plan for the houses and restrictions and covenants on the title the designees are to receive, *see supra* note 4, will likely involve (and indeed already has involved) a substantial amount of judicial time and energy.[7]

Given these two factors, and given the fact that I doubt it can be said that the absence of federal supervision of the settlement agreement would have dissuaded the plaintiffs

6. As I have noted above, the original federal interests — local input into redevelopment projects, and consideration of environmental consequences of redevelopment projects — were essentially settled in 1976 when the parties informed the district court that they had reached an agreement in principle not to tear down the houses.

7. In addition to the disputes between the University and the Sansom Committee which have engendered three separate appeals as of this date, there are the challenges by Michael Karp which have resulted in five appeals so far, the challenges by other members of the Sansom Committee who are unhappy with the negotiated settlements, and the lawsuit by H. Clayton Cook against his brother Elliot Cook and the Dechert law firm.

from bringing suit in 1973, if my view of the prudential limits on federal remedial equitable power was the law of this circuit and if the district court had this test before it in 1982 when confronted with the second consent decree, it might have refused to approve that agreement, at least to the extent that it called for continuing federal supervision.[8]

This is my perspective in hindsight, however. We are not confronted with an appeal from an order of the district court in 1984 refusing to relinquish its ongoing supervision over this lawsuit, and what I address is only the hypothetical question whether the district court abused its discretion in entering the decree. In fairness to the district court, which did not possess a crystal ball, the dispute over the meaning of the first decree was the first disagreement between the University and the Sansom Committee (as distinct from disagreements among members of the Sansom Committee) since those parties had agreed in principle to a settlement of their dispute in 1976. The relevant focus for deciding whether the district court abused its discretion in granting particular relief is on the situation as it appeared to the district court at the time the relief was granted. Thus, because the district court might reasonably have concluded at that time that approval of the 1982 consent decree would bring the case to an end,[9] the

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8. In 1980 by contrast, there was little reason for the district court to suspect that much litigation would result from the consent decree. After all, nothing at all had happened for more than four years, and the three main protagonists in the original litigation — the Sansom Committee, the RDA, and the University — were now representing to the court that they were in complete agreement on what to do with the houses. Also, the 1980 consent decree did not include the side agreement between the University and the Sansom Committee, so that if the houses had been transferred to Sansom Committee designees the terms of the 1980 consent decree would have been satisfied and the district court would have been out of the case completely.

9. At oral argument counsel for the University stated that: "the University believed the first time and it also believed the second time that the consent decree ended things, not that it began things." Oral Argument Transcript, at 5.

propriety of the court's approval of that decree would appear to be problematic. I conclude my illustration by declaring the question to be a close one; I do not reach a conclusion because the points on which I have written were not raised by the parties or the district court.

GARTH, J., dissenting:

Chief Judge Seitz's attempt, laudable in itself, to enable the parties involved in a complex controversy to forge a lasting and equitable peace, stands on untenable footing. The limited jurisdiction that federal courts possess does not encompass the enforcement of consent judgments against or in favor of parties whose rights the court had no power to adjudicate in an involuntary proceeding. Because a majority of this court holds otherwise, I respectfully dissent.

I.

The appeal taken by the University of Pennsylvania in this case asserts that the district court had no subject matter jurisdiction to adjudicate any dispute between the University and the Committee "or to interpret, enforce, or modify agreements between them." (Br. 19). Chief Judge Seitz reads the University's position as disclaiming federal question jurisdiction as of 1976: "The University contends that the district court lacked federal question jurisdiction in 1976 because HUD filed an environmental impact statement dated in that year." (Maj. op. at 6). He also understands the University's argument to be that "the district court had no subject matter jurisdiction to enter the 1980 Consent Decree because its terms incorporated essentially state law relief." (*Id.*) While it is true that both arguments can be characterized as Chief Judge Seitz has reported them, they are in substance no more than subordinate elements of the University's overall contention that no federal question giving the district court jurisdiction has ever been raised as to the University, and that the consent decrees cannot be enforced with respect to the University because they are outside the court's jurisdictional

power. The thrust of the University's position is captured by the following three statements which appear in its brief:

> Neither the Sansom Committee nor any of the parties has ever raised a federal question vis-a-vis the University, nor has a federal question of any kind been raised since the University became a party to the settlement of this litigation.
>
> * * *
>
> The only conceivable explanation for federal court adjudication of disputes of this nature would be premised on an extension of the concepts of pendent or ancillary jurisdiction, *i.e.*, that the University could properly be joined as a pendent party in January of 1981 in order to resolve the pre-existing litigation. No such extension of these doctrines can be justified.

(Br. of University at 20, 21 (footnote omitted)). The University concludes its jurisdictional argument stating:

> The present disputes, all of which involve interpretations of agreements between the Sansom Committee and the University (or efforts to modify the terms of such agreements), cannot be made a subject of that Court's enforcement power if they are outside its jurisdictional power.

(Br. of University at 26 (footnote omitted)). I agree.

A.

A consent judgment is a judicial act, in which the court adjudicates the plaintiff 's right of recovery and the extent of it, both of which are essential elements of the judgment, *Pope v. United States*, 323 U.S. 1, 12 (1944); *see United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). The court does not determine the merits of the dispute, but its entry of a decree constitutes an adjudication between the parties. *Swift & Co. v. United States*, 276 U.S. 311, 327 (1928).

A court's authority to enter a consent decree where the plaintiff seeks to enforce a federal statute comes only from the

statute that the decree is intended to enforce. *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961). Within the confines of this authority a court has broad power to adopt as its own judgment or decree a contractual agreement into which the parties have entered and which is tailored to the necessities of a particular case. *Handler v. SEC*, 610 F.2d 656, 659 (9th Cir. 1959). The guiding principle in adopting a decree is that it further the purpose of the statute to be enforced. *System Federation, supra*, 364 U.S. at 651; *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125 (D.C. Cir. 1983); *United States v. Motor Vehicle Mfrs. Ass'n.*, 643 F.2d 644, 650 (9th Cir. 1981).

Indeed, the consent decree may even prescribe relief beyond that authorized by the statute. *Swift & Co. v. United States*, 276 U.S. 311, 328-30 (1928). But there is a crucial distinction between an attack on the scope of relief contained in the decree and a contention that the court was without jurisdiction to adopt the decree in the first instance: between an "error of decision," which does not render a consent judgment void, and the "want of power to decide," which renders any judgment entered void and open to collateral attack. *Id.* at 330. The court's power to grant relief broader than that authorized by the statute only exists if it has acquired jurisdiction of the subject matter and the parties. *Id.* at 326. Persons cannot by consent give the court jurisdiction over the subject matter, *Neirbo v. Bethlehem Corp.*, 308 U.S. 165, 167 (1939), *Richerson v. Jones*, 551 F.2d 918, 923 n.7 (3d Cir. 1977); *see Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), although they may by consenting to judgment bind their persons to its jurisdiction, "if when the court acts jurisdiction has been obtained." *Pacific R.R. v. Ketchum*, 101 U.S. 289, 298 (1879). Moreover, this admonition exists side-by-side with the rule that "[p]arties to a suit have the right to agree to anything they please in reference to the subject matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings." *Id.* at 297.

The majority's disposition of this case ignores the fundamental distinction made in the seminal consent decree cases. A court's power to enter a consent decree flows from the same font of jurisdiction as does its power to enter an involuntary decree (that is, a decree which is not the product of the parties' consent). That power exists only if the court has the initial authority to adjudicate the rights of those parties whom it binds to its judgment. As earlier noted, that power cannot be conferred by consent; it is given by the Constitution and implementing statutes as enacted by Congress. Nor does it avail a party to argue that another's "consent" to the subject matter jurisdiction of a court can then estop the "consenting party" from challenging the federal court's jurisdiction. *Rubin v. Buckman*, No. 83-1285, slip op. at 4 (3d Cir. Feb. 7, 1984). Thus, unless a court has subject matter jurisdiction over the entire dispute between the parties who have consented to enter into a "consent agreement," it cannot adopt that agreement as a "judicial act" and thereby dignify it by the judge's signature as a consent judgment.[1]

Accordingly, the cases holding that a consent decree can afford further relief affecting a wider scope of activities than could relief authorized by the statute sued upon, *e.g.*, *Swift & Co. v. United States*, 276 U.S. 311, 328-30 (1928); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1174-77 (D.C. Cir. 1983); *Larson v. Sielaff*, 702 F.2d 116, 117-19 (7th Cir.), *cert. denied*, 104 S.Ct. 372 (1983), are of no relevance in our consideration of the power of the district court to adjudicate the rights of the University of Pennsylvania in the instant controversy. Rather, the question on which we must focus at the outset is whether the district court

1. To the extent the issue raised by the University is one of whether there existed a "case or controversy" within the meaning of Article III as to the University, that issue is foreclosed from our consideration on collateral attack of the consent judgment; it is cognizable only on direct appeal of the judgment. *Swift & Co. v. United States*, 276 U.S. 311, 376 (1977); *Coalition of Black Leadership v. Cianci*, 570 F.2d 12, 15 (1st Cir. 1978).

in the first instance had the power to enter judgment against a nonparty to the litigation, who nevertheless was concededly a party to the consent agreement which the plaintiff Committee now seeks to enforce.[2]

In general a court has no jurisdiction to determine the rights of nonparties to the litigation. *SEC v. Investors Security Corp.*, 560 F.2d 561, 568 (3d Cir. 1977).[3]

Where a court would be without power to enter judgment against a person because that person could not be made a party to the litigation, the court cannot bind that person to a consent decree. *Washington v. Penwell*, 700 F.2d 570, 574

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2. The fact that the district court — a court of limited jurisdiction — may have no authority to enforce the agreements into which the Committee and the University of Pennsylvania entered (one of which ran to hundreds of pages, including exhibits such as plot plans, blueprints, design specifications, etc.), does not mean that either of them is released from any obligation imposed by that agreement. To the contrary, here we address only the forum in which such a controversy may be entertained. If the federal court has no subject matter jurisdiction over this dispute, as I contend that it does not, the parties may nevertheless bring their action in a state court — as they would any other action on contract which seeks to enforce contractual undertakings or obligations. The courts of the Commonwealth of Pennsylvania have plenary jurisdiction over such actions and stand ready to adjudicate controversies such as this one, which is no more than a routine action on a contract, or as it was characterized by the University during oral argument before this court, a "code of federal regulations for that one block [the 3400 block of Sansom Street]." (Transcript of oral argument at 4).

3. To bind to its judgment strangers to the litigation a court must use its extraordinary powers. *See General Building Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375, 401 (1982). Such powers are granted by the All Writs Act, 28 U.S.C. §1651 (1982). *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). But the power cannot be exercised unless the court possesses independently granted subject matter jurisdiction over the dispute, since the All Writs Act does not itself provide such a grant. *Id.* at 188 n.19 (Stevens, J., dissenting in part); *Goodbar v. Banner*, 599 F.2d 431, 434 (C.C.P.A.), cert. denied, 444 U.S. 927 (1979); *see United States v. Christian*, 660 F.2d 892, 984 (3d Cir. 1981).

(9th Cir. 1983).[4] *See also Metropolitan Housing Devel. Corp. v. Village of Arlington Heights*, 469 F. Supp. 836, 854-55 (N.D. Ill. 1979) (consent does not empower court to order relief which it would not otherwise have the power to order and which the parties could not themselves otherwise contract to perform), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

In this case, the University was never a party to the litigation. Twice the University moved to intervene; twice it was rebuffed.[5] Indeed, the motion to dismiss for failure to join an indispensable party (the University), which was made by the defendants in the original action, was denied. *Sansom Committee v. Lynn*, 366 F. Supp. 1271, 1280-81 (E.D. Pa. 1973). The "settlement agreement and consent decree" made on December 18, 1980, by and among the Committee, the RDA, and the University, explicitly stated that the University "is not a party to this litigation but is a party to the settlement of this litigation." (App. A-55).

Moreover, the University could not have been made a party to the litigation, for the district court would have had no basis, short of formal intervention, for exercising subject matter jurisdiction over the Committee's claim against the University. As is contended by the University and not disputed by the Committee, there would be neither diversity nor federal question jurisdiction over such a claim. See

4. A court may bind to an *involuntary* judgment those who are the parties' privies, as defined by Fed.R.Civ.P. 65(d), see 7-part 2 Moore's Federal Practice ¶65.13 (2d ed. 1984), and so may also bind such privies to a consent decree. *Cornelius v. Hogan*, 663 F.2d 330, 334-35 (1st Cir. 1981). No claim was ever advanced before this court that the University was a privy of any party to the litigation.

5. The University moved to intervene of right, for the limited purpose of requesting that the district court order the plaintiffs to post a security fund. This motion was denied. *Sansom Committee v. Lynn*, No. 73-1444 (E.D. Pa. March 1, 1974) (Docket Entry No. 48). The University's second motion was for intervention as a party defendant to appear at a hearing on a preliminary injunction to enjoin the demolition of certain properties. The district court denied this motion, without prejudice to its later renewal. *Sansom Committee v. Lynn*, No. 73-1444 (E.D. Pa. July 30, 1974) (Docket Entry No. 62).

University's Br. at 17. As both agree, there was federal question jurisdiction over the Committee's main claims against HUD, the RDA, and their respective officers, based on the National Housing Act and NEPA. *Sansom Committee v. Lynn*, 366 F.Supp. 1271, 1278 (E.D.Pa. 1973). It is on that basis, and that basis alone, that the Committee asserts that the district court had ancillary or pendent-party jurisdiction over any dispute between the Committee and the University, by virtue of the "core" federal claim.

B.

Whether a court has jurisdiction over a non-federal claim between non-diverse parties is determined by a two-stage analysis, as set forth in *Owen Equipment Co. v. Kroger*, 437 U.S. 365 (1978), and *Aldinger v. Howard*, 427 U.S. 1 (1976). First, there must be an inquiry into whether the Constitution gives the court power to adjudicate the dispute, for which the test is whether the claims present a "common nucleus of operative fact . . . such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Second,

> there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim.

Owen Equipment, supra, 437 U.S. at 373 (quoting *Aldinger, supra*, 427 U.S. at 18). In making this second inquiry, "the context in which the nonfederal claim is asserted is crucial." *Id.* at 376. The *Owen* Court noted the typical instances in which ancillary jurisdiction has been held to exist — claims by third parties who were brought into court by the original parties, or claims of persons interested in a fund or property in the possession of the court. 437 U.S. at 375-76 & n.18. Such claims included intervention as of right. *Id.* at 375 n.18.

Before *Owen* and *Aldinger*, it had been held that a federal court has jurisdiction — ancillary jurisdiction — over actions to aid or effectuate its prior decrees, regardless of whether the court would have jurisdiction over the claim were it an original action. *Dugas v. American Surety Co.*, 300 U.S. 414, 428 (1937); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934); *Root v. Woolworth*, 150 U.S. 401, 410-12 (1893). This rule was "subject to the qualification that the relief be not of a different kind or on a different principle." *Dugas, supra*, 300 U.S. at 428.

This line of cases, however — cases which are limited to instances in which a court asserts jurisdiction to aid or effectuate its earlier decree — cannot support the exercise of jurisdiction to adjudicate the rights of the Committee vis-a-vis the University, where, as here, there is no prior judgment that the 1980 "consent decree" is necessary to effectuate. Instead, the 1980 decree (and by extension, the 1982 decree) is the very judgment sought to be effectuated by the adjudication of the University's rights via the same judgment. Such bootstrapping of jurisdiction extends the *Dugas-Local Loan-Root* line beyond its logical parameters. Thus, even if a district court would have ancillary jurisdiction to adjudicate the rights of third-party nonlitigants who are interfering with a *pre-existing* consent decree, *see New York State Ass'n for Retarded Children, Inc. v. Carey (NYSARC II)*, 466 F. Supp. 479, 482 (E.D.N.Y. 1978), *aff'd*, 612 F.2d 644 (2d Cir. 1979); *New York State Ass'n for Retarded Children, Inc. v. Carey (NYSARC I)*, 438 F. Supp. 440, 446-47 (E.D.N.Y. 1977) (alternative holding); *cf. Local Loan*, supra (ancillary jurisdiction over nonparty interfering with involuntary decree); *but see Sea Ranch Ass'n v. California Coastal Comm'n*, 552 F. Supp. 241, 247-48 n.27 (N.D. Cal. 1982) (questioning *NYSARC I & II* in the wake of *Owen Equipment*); C. Wright & A. Miller, Federal Practice & Procedure §3523 (1980 Supp.) (same), it does not follow that a federal district court would have subject matter jurisdiction to *create* a consent decree in a controversy such as the one which is presented here, where no pre-existing judgment was ever entered.

Furthermore, in light of *Owen* and *Aldinger* such an extension would be improper. It is difficult to identify what a court is to examine in applying the *Gibbs* "common nucleus" test here, since the Committee never asserted a claim against the University nor identified one in either agreement, nor did the University assert any claims. All that the University declared in the 1980 agreement was that it "alleges it has rights under a redevelopment contract affecting the herein named properties." (App. A-55). The Committee's federal claims alleged that the redevelopment plans violated federal law. It is true that the redevelopment plans at issue involved the University to the extent that the plans contemplated the University's acquisition of redevelopment rights. Thus there could appear to be a "common nucleus of operative facts" underlying these two sets of interests — one set asserted as a reason for joining the settlement agreement and one set asserted in an adversarial claim. The University's interest in adjudicating the federal claims was a practical one; invalidation of the plan would implicate its rights under the contract. Its rights were thus dependent, at least in part, upon the disposition of the federal claims.

It remains whether this interest is sufficient under the *Gibbs* test to constitute a claim that ordinarily would be expected to be tried in the same proceeding. This question need not be answered if the statutory phase of the analysis reveals that Congress did not intend that federal jurisdiction include it.

The statute that confers jurisdiction on district courts to hear federal claims is 28 U.S.C. §1331. That section allows courts to adjudicate "all civil actions arising under the Constitution, laws, or treaties of the United States." In construing the diversity-jurisdiction statute (28 U.S.C. §1332), the Court in *Owen Equipment, supra,* stated that claims by third parties "typically" support ancillary jurisdiction when such a person's "rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court." 437 U.S. at 376. The claims include compulsory counterclaims, impleader, cross-claims, and intervention as of right. *Id.* at 375 n.18. However,

the same considerations that informed the Supreme Court's construction of the diversity jurisdiction statute also counsel against expansive pendent-party federal question jurisdiction. For, as the Court noted in *Aldinger v. Howard, supra,* 427 U.S. at 17, when considering a claim of "pendent party" jurisdiction,[6] of which the claim here is a species, "[T]he reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress."

The federal cause of action here as pleaded in the plaintiff's complaint was a challenge to the performance by public agencies of their duties under the National Housing Act and the National Environmental Policy Act. The Uni-

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6. Both ancillary and pendent jurisdiction may be defined as the extension of federal jurisdiction to the resolution, by a court that has subject matter jurisdiction over a federal claim, of a state-law claim arising between citizens of different states.

> The term "ancillary" or "ancillary jurisdiction" describes those claims that are so closely related to the main claim that the court will adjudicate them regardless of the absence of a separate basis of subject matter jurisdiction. *See* Wright and Miller, *Federal Practice and Procedure:* Jurisdiction §3523 (1975). "Pendent jurisdiction" permits a plaintiff, in appropriate circumstances, to join with his federal claim a related state claim over which the court had no independent basis of subject matter jurisdiction. *See* Wright and Miller, *supra* at §3567 (1975). The doctrines of ancillary and pendent jurisdiction are distinguishable in that pendent claims are asserted by plaintiffs in their complaints and ancillary claims usually are asserted after the complaint is filed by one other than the plaintiff. See *Aldinger v. Howard and Pendent Jurisdiction,* 77 Colum.L.Rev. 127,128 n.5 (1977).

Corporacion Venezolana de Fomento v. Vintero Sales, 477 F. Supp. 615, 622 n.13 (S.D.N.Y. 1979).

"Pendent-party" jurisdiction is the name given to an extension of jurisdiction to the joinder of additional parties — as distinct from additional claims — with respect to whom there is no independent basis of federal jurisdiction. *Aldinger v. Howard,* 427 U.S. 1, 6 (1976); *see generally* Currie, Pendent Parties, 45 U.Chi.L.Rev. 753 (1978).

As I maintain *infra,* I am in agreement with the majority that although the Committee argues and analyzes the jurisdictional question in terms of pendent and ancillary jurisdiction, those doctrines are inapposite. *See* maj. op. at 7, n.4.

versity was involved, if at all, only as the named redeveloper under its contract with the RDA (it was the only redeveloper after 1973). Thus the University's rights and duties were purely contractual, as stipulated in the settlement agreement, *see supra*. The Committee has not pointed to any provision of the National Housing Act or National Environmental Policy Act that indicates that Congress intended that the adjudication of the duties of public agencies under these statutes be affected by the purely contractual rights of third-party redevelopers.[7]

The implication of these considerations becomes even more clear when we examine whether Congress ever intended that jurisdiction extend to claims involving persons who were never made party to the litigation. As has been stressed several times so far, the University was never a party to the litigation; its motions to intervene (both as-of-right and by permission) as a defendant were twice denied; it was held not indispensable; and the very consent agreement that purported to "confer" jurisdiction recognized by its own terms that the University "is not a party to this litigation."

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7. Giving the most favorable reading to the "surviving" claims — that is, the claims that were still viable after the district court's 1973 order dismissing the plaintiff's challenge to the federal agencies' actions — the majority opinion points to only matters involving the federal agencies as support for the majority's contention that federal question jurisdiction continued. The claims to which Chief Judge Seitz's majority opinion points are set out at typescript page 8 [A-7] and involve no more than charged violations by RDA and HUD with respect to failing to hold certain hearings, failing to seek approval of government bodies, failing to assure conformity with community and regional plans, and failing to provide adequate relocation. Judge Becker, in his concurring opinion, aptly observes that essentially the remaining claims involve only "A scramble over who is entitled to buy houses at bargain-basement prices from the RDA . . . . The outcome of this donnybrook does not directly involve any question of federal law." (Conc. op. p. 14) [A-20]

It is significant that none of these claims involves the University of Pennsylvania, nor could any of them support adjudication of a controversy between the Committee on the one hand and the University on the other.

Moreover, the statement of the University's interest in that 1980 agreement does not support jurisdiction premised on a consented-to intervention. It may be that parties to a consent judgment could stipulate facts showing that a party was an intervenor of right under Fed. R. Civ. P. 24(a) — either that a federal statute confers an unconditional right to intervene, *see E.E.O.C. v. AT&T*, 506 F.2d 735, 739-40 (3d Cir. 1974) (requirement for intervention of right under Rule 24(a)(1)), or that the party claims an interest relating to the property or transaction that is the subject of the action, that the disposition may as a practical matter impair his ability to protect that interest, and that his interests are not adequately represented by others, *see Pennsylvania v. Rizzo*, 530 F.2d 501, 504 (3d Cir.) (requirements for establishing right to intervene under 24(a)(2)), *cert. denied*, 426 U.S. 921 (1976). Intervention as of right needs no independent federal jurisdictional grounds. *See Owen*, 437 U.S. at 375 n.18; C. Wright & A. Miller, Federal Practice & Procedure §1917 (1972). However, the stipulation of facts contained in the 1980 agreement is plainly insufficient to support a holding of a *right* to intervene, much less *consent* to intervention by the other parties.

II.

Thus, it is clear that no subject matter jurisdiction and no ancillary or pendent-party jurisdiction exists with respect to any claim made by the Committee which implicates the University of Pennsylvania in the present controversy. Accordingly, the district court was without power to adjudicate any rights affecting the University of Pennsylvania and could not, therefore, exercise its power by adding its signature or imprimatur to a purely contractual agreement between these parties. Instead, as noted, the parties' rights under the consent agreements of 1980 and 1982 are contractual only, and thus may only be enforced as such. *See* Note, The Consent Judgment as an Instrument of Compromise and Settlement, 72 Harv. L. Rev. 1314, 1322 (1959), and note 3 *supra*.

Because the majority of the court has given effect to a judgment which the district court had no power to enter, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1120

THE SANSOM COMMITTEE, an unincorporated association, appearing by ELLIOT C.R. COOK, trustee ad litem, WILLIAM B. BOLTON, MICHAEL KARP, ROBINSON FREDENTHAL, NICOLES, INC., t/a LA TERRASSE, NICHOLAS MUHLENBERG, CAMPUS PHARMACY, INC., and JOHN W. McCOUBREY,

Appellees

v.

JAMES LYNN, individually and as Secretary, Department of Housing and Urban Development, JOSEPH LaSALA, Acting Area Director, Department of Housing and Urban Development and THE REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,

Appellant.

On Appeal from the United States
District Court for the Eastern
District of Pennsylvania

(D.C. Civ. No. 73-1444)

Argued December 13, 1983

Before: SEITZ, *Chief Judge*,
GARTH and BECKER, *Circuit Judges*

(Opinion Filed June 1, 1984)

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OPINION OF THE COURT

PER CURIAM

This is an appeal from an order of the district court dated February 10, 1983, extending from April 7, 1983 to June 7, 1983, the deadline date in the 1982 Consent Decree for taking title to 3430, 3432, 3434 and 3436 Sansom Street. The background of this protracted litigation is found in *Sansom Committee v. Lynn*, No. 83-1121 (*Sansom I*), filed contemporaneously herewith. We have appellate jurisdiction under 28 U.S.C. §1291 (1976).

The Committee has moved to dismiss the appeal of the University as moot. It contends that the properties in question were sold on or before April 7, 1983, the critical date under the 1982 Consent Decree. If that is true, the extension period granted by the order now appealed was not required to support the sale to the designees.

In its reply brief the University says that "It is possible that the Committee is correct in this regard." Other matters in the papers also suggest mootness. We, therefore, conclude that the case is moot. The University's real concern in this appeal appears to be addressed to the Committee's request that double costs and damages be assessed against it. Since we are rejecting the Committee's request that concern is obviated.

This matter will be remanded to the district court with a direction to vacate its order of February 10, 1983, on the ground of mootness. See *United States v. Munsingwear*, 340 U.S. 36 (1950).

No damages or costs will be allowed. We deny the Committee's request that this appeal be dismissed for an alleged failure to follow the rules of appellate procedure.

To the Clerk of the Court:

Please file the foregoing per curiam opinion.

_____

Judge

Sansom Committee v. Lynn, No. 83-1120

Garth, J., *dissenting:*

In *Sansom Committee v. Lynn*, No. 83-1121, I concluded that subject matter jurisdiction was lacking with respect to the actions brought against the University of Pennsylvania. As that opinion points out, I would hold that the district court could not have bound the University of Pennsylvania in any of the proceedings brought against it by the Committee which sought enforcement of the consent decree and other relief. Because I am of the opinion there existed no subject matter jurisdiction which would permit the federal district court to act in any of the instant appeals involving the University of Pennsylvania, I would reverse the district court's order of February 10, 1983, which extended the deadline for taking title, and direct the district court to dismiss the action for want of subject matter jurisdiction.

Implicit in my decision is the fact that nothing precludes this issue or any other issue from being prosecuted or litigated in the appropriate state court. I therefore respectfully dissent from the majority opinion which holds the controversy to be moot.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1253

THE SANSOM COMMITTEE, an unincorporated association, appearing by ELLIOT C.R. COOK, trustee ad litem, WILLIAM B. BOLTON, MICHAEL KARP, ROBINSON FREDENTHAL, NICOLES, INC., t/a LA TERRASSE, NICHOLAS MUHLENBERG, CAMPUS PHARMACY, INC., and JOHN W. McCOUBREY,

Appellees

v.

JAMES LYNN, individually and as Secretary, Department of Housing and Urban Development, JOSEPH LaSALA, Acting Area Director, Department of Housing and Urban Development and THE REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,

Appellant.

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania

(D.C. Civ. No. 73-1444)

Argued December 13, 1983

Before: SEITZ, *Chief Judge*,
GARTH and BECKER, *Circuit Judges*

(Opinion Filed June 1, 1984)

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Redevelopment Authority.

OPINION OF THE COURT

SEITZ, *Chief Judge*.

The Trustees of the University of Pennsylvania (the "University") appeal from an order of the district court dated April 5, 1983. Much of the history of this complex litigation is found in our opinion in *Sansom Committee v. Lynn*, No. 83-1121 (*Sansom I*), filed contemporaneously. This appeal will be designated as *Sansom II*.

This appeal arises out of an order following a motion by The Sansom Committee (the "Committee") to modify the 1982 Consent Decree signed by the Committee and the University. The order extended the deadline provided in the 1982 Consent Decree for the purchase of properties by the Committee's designees until thirty days after the termination of any appeals relating to the properties. A preliminary issue is the basis for our appellate jurisdiction. A major purpose of the district court's order was to preserve the rights that the consent decree gave the designees by preventing the University from taking any action premised on the original expiration date in the 1982 Consent Decree. We believe that this order is in the nature of a preliminary injunction, prohibitory in nature, and intended to maintain the status quo until the University's rights regarding the properties in question have been finally determined. As a preliminary injunction, the order of April 5, 1983 is appealable under 28 U.S.C. 1292(a)(l). Our review is for abuse of discretion.

The district court granted the motion extending the deadline over the University's objection. In its unreported opinion, *Sansom Committee v. Lynn*, No. 73-1444 (E.D. Pa. April 5, 1983), the court ruled that despite the University's pending appeal in *Sansom I* attacking the consent decrees, the court had residual jurisdiction to maintain the status quo. It went on to hold that if the deadline was not extended, the rights of the designees might be irretrievably lost because of the expiration date in the 1982 Consent Decree. It proceeded to enter the order now appealed by the University.

The University first challenges the power of the district court to enter the order while an appeal from the earlier order denying the University's motion to enforce the 1982 Consent Decree was pending. It is certainly a generally established legal principle that a district court lacks the power to act in a matter while an appeal is pending in such matter. *See SEC v. Investors Security Corp.*, 560 F.2d 561, 568 (3d Cir. 1977). However, it is well recognized that a district court possesses residual jurisdiction to enter orders to assist in maintaining the true status quo pending disposition of an appeal. *See Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). It was under this theory that the district court granted the extension of time for the designees to purchase. In our view it assuredly could do so, assuming it had subject matter jurisdiction to enter the 1982 Consent Decree. Since we have held in our opinion in *Sansom I* that the district court had such subject matter jurisdiction, the University's attack on the district court's power to enter this order must fail.

Finally, the University argues that the district court erred by not providing for an evidentiary hearing before entering its order extending the time for the designees to elect whether to purchase the properties involved. This brings us to a rather technical aspect of this appeal. At the time the district court entered its order, the University's appeal in *Sansom I* from the order denying its motion to enforce the 1982 consent decree was already pending. Because of this pending appeal the district court did not have the power to decide the merits of the motion to modify the consent decree. As we have stated, however, the district court's opinion accompanying its April 5th order states that the order was only meant to "preserve the status quo pending the appeal from [its] previous orders in this case." Joint Appendix at 177. We have already held that the district court had residual jurisdiction to enter such an order maintaining the status quo but not addressing the motion to modify on its merits. *Beer Drivers, supra*. The merits of the motion to modify the consent decree are still an open issue in the district court, and

are not affected or rendered moot by the district court's exercise of its power to maintain the status quo.

Did the district court abuse its discretion in not conducting an evidentiary hearing with respect to the Committee's motion even though the University filed a memorandum in opposition to the motion? We believe that the undisputed facts already in the record were adequate to sustain the district court's decision to grant an injunction maintaining the status quo. Given this, and our conclusion that the order appealed from does not determine the merits of the Committee's motion to modify the 1982 Consent Decree, we hold that the district court was within its discretion in not holding an evidentiary hearing and in ordering the extension of time to preserve the status quo.

The April 6, 1983 order of the district court will be affirmed. Costs will be taxed against appellant.

GARTH, J., *dissenting:*

In *Sansom Committee v. Lynn,* No. 83-1121, I concluded that the district court lacked subject matter jurisdiction to enforce the consent agreements as consent judgments with respect to the University of Pennsylvania. Because I would hold that the district court was without jurisdiction to enforce the consent "judgment," I would also hold that it was without jurisdiction to entertain the Committee's motion to modify the 1982 consent decree. I would therefore vacate the district court's order of April 5, 1983 that modified the decree by extending the deadline and I would direct the district court to dismiss this action for lack of subject matter jurisdiction. I therefore respectfully dissent from the majority opinion which reaches the merits of the controversy and affirms the district court's order.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1121

THE SANSOM COMMITTEE, an unincorporated association, appearing by ELLIOT C. R. COOK, trustee ad litem, WILLIAM B. BOLTON, MICHAEL KARP, ROBINSON FREDENTHAL, NICOLES, INC., CAMPUS PHARMACY, INC., JOHN McCOUBREY,

Appellees

v.

JAMES LYNN, individually and as Secretary, Department of Housing and Urban Development, JOSEPH LaSALA, THE REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA

Appellants

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civ. No. 73-1444)

Argued December 13, 1983

Before: SEITZ, *Chief Judge*,
GARTH and BECKER, *Circuit Judges*

(Opinion Filed June 1, 1984)

ORDER AMENDING OPINION

It is hereby ordered that Judge Becker's concurring opinion in the panel opinion filed June 1, 1984, is hereby amended as follows:

1. Insert a new footnote 5 after the first sentence in the first paragraph of text, ending with the words "state court," on page 22 of the slip opinion, to read:

> 5. Indeed there is no reason why the parties could not consent in the decree to take disputes, or at least specified disputes, to state court.

2. Re-number the remaining footnotes 6, 7, 8, and 9 in the concurring opinion as 7, 8, 9 and 10.

BY THE COURT:

Edward R. Becker

Circuit Judge

DATED: June 21, 1984

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1121

THE SANSOM COMMITTEE, an unincorporated association, appearing by ELLIOT C.R. COOK, trustee ad litem, WILLIAM B. BOLTON, MICHAEL KARP, ROBINSON FREDENTHAL, NICOLES, INC., t/a LA TERRASSE, NICHOLAS MUHLENBERG, CAMPUS PHARMACY, INC., and JOHN W. McCOUBREY,

Appellees

v.

JAMES LYNN, individually and as Secretary, Department of Housing and Urban Development, JOSEPH LaSALA, Acting Area Director, Department of Housing and Urban Development and THE REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,

Appellant.

On Appeal from the United States
District Court for the Eastern
District of Pennsylvania

(D.C. Civ. No. 73-1444)

SUR PETITION FOR REHEARING

Present: Aldisert, *Chief Judge*, Seitz, Gibbons, Hunter, Weis, Garth, Becker, *Circuit Judges*.

The petition for rehearing filed by appellant, The Trustees of the University of Pennsylvania, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing filed by The Trustees of the University of Pennsylvania for the reasons expressed in his panel dissent.

By the Court,

_____

Circuit Judge

DATED: July 6, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1120

THE SANSOM COMMITTEE, an unincorporated association, appearing by ELLIOT C.R. COOK, trustee ad litem, WILLIAM B. BOLTON, MICHAEL KARP, ROBINSON FREDENTHAL, NICOLES, INC., t/a LA TERRASSE, NICHOLAS MUHLENBERG, CAMPUS PHARMACY, INC., and JOHN W. McCOUBREY,

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v.

JAMES LYNN, individually and as Secretary, Department of Housing and Urban Development, JOSEPH LaSALA, Acting Area Director, Department of Housing and Urban Development and THE REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,

Appellant.

On Appeal from the United States
District Court for the Eastern
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(D.C. Civ. No. 73-1444)

SUR PETITION FOR REHEARING

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By the Court,

_____

Circuit Judge

DATED: July 6, 1984

A-50

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1253

THE SANSOM COMMITTEE, an unincorporated association, appearing by ELLIOT C.R. COOK, trustee ad litem, WILLIAM B. BOLTON, MICHAEL KARP, ROBINSON FREDENTHAL, NICOLES, INC., t/a LA TERRASSE, NICHOLAS MUHLENBERG, CAMPUS PHARMACY, INC., and JOHN W. McCOUBREY,

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THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA,

Appellant.

On Appeal from the United States
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(D.C. Civ. No. 73-1444)

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Judge Garth would grant the petition for rehearing filed by The Trustees of the University of Pennsylvania for the reasons expressed in his panel dissent.

By the Court,

_____

Circuit Judge

DATED: July 6, 1984

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
42 U.S.C. §4332(c)

§4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and

enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . .

NATIONAL HOUSING ACT OF 1949
Selected Sections

42 U.S.C. §1451(c) and (e)

§1451. Local programs

Requirements; minimum standards housing code

(c) No contract shall be entered into for any loan or capital grant under this subchapter, unless (1) there is presented to the Secretary by the locality a workable program for community improvement (which shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life) for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight, to encourage needed urban rehabilitation, to provide for the redevelopment of blighted, deteriorated, or slum areas, or to undertake such of the aforesaid activities or other feasible community activities as may be suitably employed to achieve the objectives of such a program, and (2) on the basis of his review of such program, the Secretary determines that such program meets the requirements of this subsection and certifies that the Federal assistance may be made available in such community: *Provided further*, That commencing three years after September 2, 1964 or, in the case of an Indian tribe, band, or nation, commencing January 1, 1970, no workable program shall be certified or re-certified unless (A) the locality has had in effect,

for at least six months prior to such certification or recertification, a minimum standards housing code, related but not limited to health, sanitation, and occupancy requirements, which is deemed adequate by the Secretary, and (B) the Secretary is satisfied that the locality is carrying out an effective program of enforcement to achieve compliance with such housing code. Notwithstanding any other provision of law, in the case of a contract with an Indian tribe, band, or nation (or a public housing or other public agency for such tribe, band, or nation established under State or tribal law), the workable program and minimum standards housing code, referred to in the preceding sentence, may be presented to the Secretary by such tribe, band, or nation, and it shall be subject to the requirements of law with respect to such program and code only to the extent that such tribe, band, or nation has the legal jurisdiction and power to carry out such requirements.

Workable program requirements

(e) No loan or grant contract may be entered into by the Secretary for an urban renewal project unless he determines that (1) the workable program for community improvement presented by the locality pursuant to subsection (c) of this section is of sufficient scope and content to furnish a basis for evaluation of the need for the urban renewal project; and (2) such project is in accord with the program.

42 U.S.C. §1455(a), (c) and (d)

§1455. Requirements for loan or capital grant contracts

Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

Approval of urban renewal plan

(a) The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the

project is situated, and that such approval include findings by the governing body that (i) the financial aid to be provided in the contract is necessary to enable the project to be undertaken in accordance with the urban renewal plan; (ii) the urban renewal plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise; (iii) the urban renewal plan conforms to a general plan for the development of the locality as a whole; and (iv) the urban renewal plan gives due consideration to the provision of adequate park and recreational areas and facilities, as may be desirable for neighborhood improvement, with special consideration for the health, safety, and welfare of children residing in the general vicinity of the site covered by the plan;

Temporary relocation of individuals and families displaced from urban renewal area; relocation assistance program; review of relocation plan

(c)(1) There shall be a feasible method for the temporary relocation of individuals and families displaced from the urban renewal area, and there are or are being provided, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the individuals and families displaced from the urban renewal area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced individuals and families and reasonably accessible to their places of employment. The Secretary shall issue rules and regulations to aid in implementing the requirements of this subsection and in otherwise achieving the objectives of this subchapter. Such rules and regulations shall require that there be established, at the earliest practicable time, for each urban renewal project involving the displacement of individuals, families, and business concerns occupying property in the urban renewal area, a relocation assistance program which shall include such

measures, facilities, and services as may be necessary or appropriate in order (A) to determine the needs of such individuals, families, and business concerns for relocation assistance; (B) to provide information and assistance to aid in relocation and otherwise minimize the hardships of displacement, including information as to real estate agencies, brokers, and boards in or near the urban renewal area which deal in residential or business property that might be appropriate for the relocating of displaced individuals, families, and business concerns; and (C) to assure the necessary coordination of relocation activities with other project activities and other planned or proposed governmental actions in the community which may affect the carrying out of the relocation program, particularly planned or proposed low-rent housing projects to be constructed in or near the urban renewal area.

(2) As a condition to further assistance after August 10, 1965 with respect to each urban renewal project involving the displacement of individuals and families, the Secretary shall require, within a reasonable time prior to actual displacement, satisfactory assurance by the local public agency that decent, safe, and sanitary dwellings as required by the first sentence of this subsection are available for the relocation of each such individual or family.

(3) Within one year after December 24, 1969, and every two years thereafter, the Secretary shall review each locality's relocation plan under this subsection and its effectiveness in carrying out such plan.

Acquisition of land; public hearings

(d) No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing.

42 U.S.C. §1460(c) paragraph following (10)

Notwithstanding any other provision of this subchapter, (A) no contract shall be entered into for any loan or capital

grant under this subchapter for any project which provides for demolition and removal of buildings and improvements unless the Secretary determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area, and (B) not less than 10 per centum of the aggregate amount of (i) grants authorized to be contracted for under this subchapter by the Housing and Urban Development Act of 1965 and subsequent Acts, and (ii) loans authorized to be made under section 1452b of this title, shall be available for projects assisted with such grants or loans which involve primarily code enforcement and rehabilitation.

42 U.S.C. §1463(a)

§1463. Financial assistance for urban renewal projects in areas involving colleges, universities, or hospitals

Authorization; local grant-in-aid

(a) In any case where an educational institution or a hospital is located in or near an urban renewal project area and the governing body of the locality determines that, in addition to the elimination of slums and blight from such area, the undertaking of an urban renewal project in such area will further promote the public welfare and the proper development of the community (1) by making land in such area available for disposition, for uses in accordance with the urban renewal plan, to such educational institution or hospital for redevelopment in accordance with the use or uses specified in the urban renewal plan, (2) by providing, through the redevelopment of the area in accordance with the urban renewal plan, a cohesive neighborhood environment compatible with the functions and needs of such educational institution or hospital, or (3) by any combination of the foregoing, the Secretary is authorized to extend financial assistance under this subchapter for an urban renewal project in such area without regard to the requirements in section 1460 of this title with respect to the predominantly residential character or predominantly residential reuse of urban renewal areas.

The aggregate expenditures made by any such institution or hospital (directly or through a private redevelopment corporation or municipal or other public corporation) for the acquisition within, adjacent to, or in the immediate vicinity of the project area, of land, buildings, and structures to be redeveloped or rehabilitated by such institution for educational uses or by such hospital for hospital uses in accordance with the urban renewal plan (or with a development plan proposed by such institution, hospital, or corporation, found acceptable by the Secretary after considering the standards specified in section 1460(b) of this title, and approved under State or local law after public hearing) and for the demolition of such buildings and structures if, pursuant to such urban renewal or development plan, the land is to be cleared and redeveloped, and for the relocation of occupants from buildings and structures to be demolished or rehabilitated, as certified by such institution or hospital to the local public agency and approved by the Secretary, shall be a local grant-in-aid in connection with such urban renewal project: *Provided*, That no such expenditure shall be eligible as a local grant-in-aid in any case where the property involved is acquired by such educational institution or hospital from a local public agency which, in connection with its acquisition or disposition of such property, has received, or contracted to receive, a capital grant pursuant to this subchapter: *Provided further*, That no such expenditure shall be deemed ineligible as a local grant-in-aid in connection with an urban renewal project, to the extent that the expenditure is otherwise eligible, if the facilities, land, buildings, or structures with respect to which the expenditure is made are located within one mile of the project.

42 U.S.C. § 1469(c)(1)

§1469. Declaration of purpose

Conditions for approval of applications for financial assistance

(c) No application for financial assistance in planning and carrying out a neighborhood development program shall be approved by the Secretary unless—

(1) the governing body of the locality has, by resolution or ordinance, approved the proposed program and the annual increment covered by the application and authorized the filing of the application for financial assistance; . . .

42 U.S.C. §1469c

§1469c. General provisions

Workable program requirement; capital grants; relocation requirements; transient housing; demolition and removal of buildings and improvements

(a) For purposes of this part—

(1) the workable program requirement in section 1451(c) of this title shall apply to the authorization, rather than the execution, of any contract for loans or capital grants;

(2) capital grants on a three-fourths basis may only be made under section 1453(a)(2)(B) of this title;

(3) the relocation requirements specified in section 1455(c) of this title shall apply to each annual increment of an approved program;

(4) section 1456(g) of this title (relating to transient housing) shall apply to activities undertaken under approved programs, except that the determination as to need for transient housing shall be made with respect to

any sale or lease of land for construction of such housing prior to such sale or lease; and

(5) the requirement concerning demolition and removal of buildings and improvements stated in clause (A) of the sentence following paragraph (10) of section 1460(c) of this title shall apply to each annual increment of an approved program.

Obligation to provide financial assistance for subsequent annual increments

(b) The approval by the Secretary of financial assistance for one or more annual increments of a neighborhood development program shall not be considered as obligating him to provide financial assistance for any subsequent annual increments.

Extent of urban renewal plan; modification; establishment of requirements prescribing scope and content of plan

(c) The urban renewal plan referred to in section 1460(b) of this title may cover one or more of the urban renewal areas covered by a neighborhood development program and such plan may be modified from time to time to cover additional urban renewal areas added to the program. The Secretary may establish such requirements as he deems appropriate prescribing the scope and content of such plan, taking into consideration, among other matters, the degree of detail needed in the plan to properly and expeditiously carry out the activities and undertakings proposed in any annual increment of a neighborhood development program.

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

No. 84-232

In The

SUPREME COURT OF THE UNITED STATES

THE TRUSTEES OF THE UNIVERSITY
OF
PENNSYLVANIA,

Petitioners

v.

THE SANSOM COMMITTEE,

Respondent

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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24pp

QUESTION PRESENTED

Whether a federal district court is powerless to enter and enforce a consent decree resolving a dispute raising a federal question.

PARTIES

The litigants before the Court of Appeals for the Third Circuit were the Sansom Committee, which was a plaintiff in the District Court, a party to the Consent Decree, the responding party in one of the motions and the moving party in two of the motions that are the subject matter of this Petition for Certiorari, and the appellee in the Court of Appeals, and The Trustees of the University of Pennsylvania, an intervening party for purposes of the Consent Decree entered by the District Court, the moving party in one of the motions and the

responding party in two of the motions that are the subject matter of this petition for and the appellant in the Court of Appeals. Counsel for the Redevelopment Authority of the City of Philadelphia, a defendant in the District Court, entered an appearance but did not participate in the proceedings before the Court of Appeals.

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COUNTERSTATEMENT OF THE CASE

The Petition for Certiorari involves a consent decree entered as a judgment of the United States District Court for the Eastern District of Pennsylvania to settle claims brought under the National Housing Act of 1949 ("NHA"), 42 U.S.C. §1441 et seq., and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §4321 et seq.

The Sansom Committee, a committee of concerned citizens living in and using the historical rowhouses which comprise the 3400 Sansom-Walnut block of Philadelphia, brought suit in 1973 in an effort to preserve their environment. (A-3) The Committee sought to save the buildings on this block from demolition, rehabilitate them, and preserve the existing mix of residential and commercial use. (A-3).

The 3400 Sansom-Walnut block had been acquired by The Redevelopment Authority of the City of Philadelphia (the "Redevelopment Authority") by condemnation. The Redevelopment Authority, in conjunction with the Department of Housing and Urban Development ("HUD") planned to demolish the buildings and sell the land to the University of Pennsylvania for redevelopment. Under the proposed redevelopment plan, the university would then transfer its redevelopment rights to a commercial developer who planned to build a high rise building.

In its complaint, the Committee charged that the redevelopment plan and the process by which it was approved violated federal law. (A-4) The district court assumed subject matter jurisdiction over these claims pursuant to sections 1331 and 1361 of Title 28 of the United States

Code. The Sansom Committee v. Lynn, 366 F. Supp. 1271, 1278-80 (E.D. Pa. 1973.)

Early in the course of this litigation, the Sansom Committee preliminarily moved to enjoin demolition of the block facing Walnut Street and subsequently the portion of the block facing Sansom Street. The University participated in those proceedings although the district court did not allow it to intervene as a party at that stage, noting that its denial of intervention did not preclude the University's later intervention. Although the Committee was unseccessful in blocking demolition of the Walnut Street block, the district court granted the Committee's motion to enjoin termination of the Sansom Street leases, staying that block's threatened destruction.

Following the district court's issuance of the of the preliminary injunction, the Redevelopment Authority, the University and the Committee began settlement negotiations. Obviously at this point, the University, which claimed to have redevelopment rights to the properties, was an essential party. Finally in 1976, the Sansom Committee and the Agencies submitted a stipulation to the court asserting that they had "engaged in serious and fruitful settlement negotiations in consultation with the University of Pennsylvania" to resolve the dispute. (A-4) This resolution would, if implemented, resolve the federal claims of the plaintiffs and involved a new plan for the redevelopment of the block. Since the planned resolution of the federal claims directly affected property interests of the University, it was necessary for the University to participate in the settlement. The court approved this method of resolving the dispute. (A-4).

In December 1980, the parties finalized a settlement, and the district court entered a consent decree containing the terms of the settlement. The University consented to the court's in personam jurisdiction and participated as a party to the Agreement and as a signatory to the Consent decree. At that point, the University, the other parties to the consent decree, and the court agreed that the district court would retain jurisdiction to enforce the decree and that any party to the decree could move to enforce it. (A-4).

Unfortunately the entry of the consent decree did not bring peace, and in 1982, the Sansom Committee sought judicial enforcement of the decree. More negotiations followed and led to a second, more detailed consent decree. Like the first consent decree, the second decree provided that the court would retain jurisdiction for purposes

of enforcement. (A-5).

After the approval and entry of the second Court-Ordered consent decree, disputes arose. This time it was the University who first moved for enforcement of the decree it had entered, moving for an Order entitling it to purchase some of the properties by redesignating it as the developer. (A-5) The court denied this attempt by the University to renege on its commitments. The court subsequently entered two additional Orders seeking to preserve the status quo of its Consent Decree pending the University's appeal of the denial of the motion for redesignation. The University also appealed the two Orders which sought to preserve the status quo.

On appeal of those Orders to the Third Circuit in 1983, and only after it had lost in all actions to enforce the decrees

instituted by either side, the University raised the question of subject matter jurisdiction. (A-5) As the Court of Appeals pointed out, "The University's principal argument is that the district court had no jurisdiciton to enter the 1980 Consent Decree because its terms incorporated essentially state law relief." (A-6).

The Third Circuit rejected the University's challenges to the jurisdiction of district court pursuant to Pacific Railroad v. Ketchum, 101 U.S. 289 (1879), and other case law. After analyzing the unique factual background and procedural history of this case, the Court of Appeals concluded that the district court had federal question jurisdiction over the dispute both at the inception of the lawsuit in 1973, and at the time the consent decrees were approved (A-6). The Third Circuit found that the consent decree which provided that the

properties be rehabilitated with maximum participation by interested members of the public "was directly responsive to the Committee's complaint under" the NHA and NEPA. (A-8) Accordingly, under the teachings of Pacific Railroad and its progeny, it was clearly within the federal court's jurisdiction to implement the consent decrees. The doctrines of ancillary and pendant jurisdiction were simply not implicated. (A-6-9)

REASONS FOR DENYING THE WRIT

1. As the Third Circuit Properly Concluded, The Enforcement Of This Consent Decree Does Not Implicate Issues Of Pendent And Ancillary Jurisdiction, And The Decision Below Is Not In Conflict With Any Decisions Of This Court

The issue presented by this lawsuit is whether a federal District Court has the power to enforce a consent decree entered in litigation properly before it against a party over whom the Court has per-

sonal jurisdiction. The answer is plain and does not raise issues of sufficient uncertianty so as to merit the attention of this Court.

In Pacific Railroad v. Ketchum, 101 U.S. 289, 297 (1879), this Court held:

> Parties to a suit have the right to agree to anything they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings.

The issue raised in this case is not one involving the outer limits of federal subject matter jurisdiction, but instead the highly fact-specific issue of whether the settlement agreement and the consent decree which embodied it came within the general scope of the particular case made by the pleadings. The Court of Appeals, while recognizing that some consent decrees may be beyond the power of a federal court to approve and that a district court cannot

wield its equity power beyond the realm of its subject matter jurisdiction (A-7), found that in this case the district court had not exceeded its jurisdictional limits.

The Third Circuit concluded that the district court properly determined that the settlement agreement was in fact directly responsive to the Committee's complaint charging lack of public participation in the redevelopment process as required by law. As Chief Judge Seitz stated:

> [U]nder the 1980 Consent Decree, the properties would be rehabilitated with maximal participation by interested members of the public. This is consonant with the general policies and goals of NEPA...and of the NHA...

(A-8) As such, the district court was empowered to enter and enforce the settlement as a decree of the court.

Neither the participation of the

University in the consent decree nor the enforcement of that decree against it raises any issue of subject matter jurisdiction. What the University's Petition ignores is the fact that absent the University's involvement in the agreement and the University's inclusion in the court decree, the federal goals of maximum participation by interested members of the public could not be achieved. Simply put, the case was indisputably brought as a case setting forth a federal question. Federal question jurisdiction was challenged but sustained by the district court in 1973, and that determination was not appealed. Federal issues and concerns remained at the time the settlement agreement was brought before the court for its approval. The court properly determined, as had the parties themselves, that the University's presence was required to reach a proper and full resolution of the federal issues before the court. The University freely participated in this resolution.

To raise the spectre that a federal district court is powerless to resolve a dispute properly before it by giving effect to a meaningful resolution reached by all affected parties is to chill potential federal plaintiffs from exercising their federal rights in federal court. No litigant will choose to effectuate his rights in a judiciary powerless to resolve those rights and to enforce that resolution. See Local Loan Co. v. Hunt, 292 U.S. 234, 239 - 241 (1934). Aware that summary enforcement of a settlement reached to resolve a federal case is not available, and that enforcement requires the institution of a separate lawsuit in the frequently crowded state court system for breach of contract, federal litigants will think more than twice whether it is possible to reach a just resolution of their dispute in the federal court system.

If the University's inclusion in the

consent decree raises a question of jurisdiction at all, it is an easily resolvable question of personal jurisdiction. (See A-8-9; Becker, J. concurring at A-10). The University's voluntary participation in the Consent Decree clearly represented a waiver of any objection it may have had to the Court's jurisdiction of it.

The University's assertion that the Third Circuit's ruling conflicts with this Court's previous decisions in the areas of ancillary and pendent jurisdiction is a disingenuous attempt by the University to expand the limited scope of the Third Circuit's opinion. Neither of these doctrines has any bearing upon this matter at all. All three Third Circuit Judges agreed that the dispute does not raise an issue of an ancillary or pendent jurisdiction. (A-6, n.4; Garth, J., dissenting at A-31, n. 6). Moreover, this case does not involve a question of pendent-

party jurisdiction either. That doctrine involves the assertion of subject matter jurisdiction over a non-diverse defendant involving a state-law question. Here the fact that the University is non-diverse makes no difference, since jurisdiction of the claim is based upon a federal question, not on the parties being of diverse citizenship. The University through slight-of-hand is trying to confuse the dual nature of a consent decree as both a contract and a judgment of the court to characterize the court's Orders as resolutions of state law claims. Certainly, settlements are contracts whose validity is determined by state law. A consent decree, however, is more. It is the judicial resolution of a claim, in this case, a claim raising federal questions.

Moreover, even if ancillary jurisdiction were relevant to the analysis, the assertion of jurisdiction over the University

in this case fully satisfies the traditional requirements for such jurisdiction as set forth in Aldinger v. Howard, 427 U.S. 1 (1976), so heavily relied upon by Petitioner. In Aldinger, the Court stated:

> The doctrine of ancillary jurisdiction...is bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction.

Id. at 11 (footnote omitted). Accord, Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 375 n. 18 (1978). The resolution of the federal issues in the instant case involves a plan for the rehabilitation of the property in question to insure maximum public participation consistent with federal law, and said plan is "logical[ly] depend[ent]" upon the federal issues in dispute. See Kroger, supra at 377. The

University's participation, as holder of the redevelopment rights to the property, had become necessary. Its inclusion in the federal court decree was permissible.

2. The Third Circuit's Decision Does Not Raise The Issue Of Whether Federal Courts May Assert Jurisdiction Over The State-Law Claims Of Pendent Parties.

The supposed conflict in the circuit courts described by Petitioner involving the assertion of judicial authority over a non-diverse party with respect to a state-law claim is irrelevant to this case. The Third Circuit did not express any opinion as to whether a federal court could consider the merits of a state-law claim asserted against non-diverse pendent parties in a federal question case. Nor did the Third Circuit opine whether the proper test for determining whether to assume jurisdiction in a pendent party case is the "common nucleus

of facts" test set forth in United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). To the contrary, the Third Circuit did not opine on the law of pendent parties at all.

Thus, even assuming that Aldinger has left federal courts divided on the question of pendent party jurisdiction, this case is certainly not the proper vehicle for resolution of that issue.

3. This Case Involves No Issue Of Expansion Of Federal Court Jurisdiction.

The district court's implementation of the consent decree involves no novel issue of federal jurisdiction. Instead, the case before this Court merely reasserts two axioms: a federal court has the power to enforce the resolutions it makes of those disputes. Review could lead to nothing more than the

recapitulation of these indisputable principles. If, as Petitioner contends, the question of whether a district court may allow a pendent party claim against a non-diverse party which bears "no relationship to any conceivable federal interest" is of sufficient importance to merit this Court's attention, this case does not present that question.

CONCLUSION

This case turns on its unusual facts, however, the legal principle, a district court's jurisdiction to implement a Consent Decree resolving a federal question claim, is neither novel nor disputed. The Petition for Certiorari should be denied.

Respectfully submitted,

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